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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

~~No. 234.~~ 23

E. C. CROSS AND FRANK R. CROSS, A MINOR, BY HIS GUARDIAN AD LITEM, E. C. CROSS, APPELLANTS,

vs.

L. H. ALLEN.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

FILED OCTOBER 14, 1887.

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1 UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify that I received the within citation on the 26th day of August, 1887, and personally served the same on the 26th day of August, 1887, by delivering to and leaving with Henry Ach, at the county of San Francisco, and on the 27th day of August, 1887, by delivering to and leaving with L. H. Allen, the complainant named therein, personally, at the county of Marin, in said district, a copy thereof.

J. C. FRANKS,
U. S. Marshal,
By B. DONNELLY, *Deputy.*

San Francisco, September 1st, 1887.

2 UNITED STATES OF AMERICA, *District of Oregon,* } ss:

To L. H. Allen, complainant, Greeting:

Whereas E. C. Cross & Frank R. Cross, a minor, by his guardian *ad litem*, E. C. Cross, have lately appealed to the Supreme Court of the United States from a decree rendered in the circuit court of the United States for the district of Oregon in your favor, and has given the security required by law, you are therefore hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, on the second Monday of October, A. D. eighteen hundred and eighty-seven, to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this Aug. 22, 1887.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

[Endorsed:] No. 1056. U. S. circuit court, district of Oregon. L. H. Allen *vs.* Eliza O'Donald *et al.* Citation on appeal. Filed Sept. 14, 1887. R. H. Lamson, clerk, by —— ——, deputy clerk.

3 In the Circuit Court of the United States for the District of Oregon. April Term, 1884.

Be it remembered that on the 6th day of August, 1884, there was duly filed in the circuit court of the United States for the district of Oregon a bill of complaint in words and figures as follows, to wit:

4 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
against
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William T. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, P. May Wilson, and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross; and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

Humbly complaining unto your honors, your orator, L. H. Allen, respectfully shows and avers—

That at all the dates and times herein mentioned your orator has been and still is a citizen of the State of California.

That at all times hereinafter mentioned and up to the time of their decease Thomas Cross and Pluma F. Cross were citizens of the State of Oregon.

That Elizabeth O'Donald and Jonathan O'Donald are husband and wife and are citizens of the State of Oregon.

5 That William T. Cross and Christina Cross are husband and wife and are citizens of the State of Oregon.

That Caroline M. Wright and John G. Wright are husband and wife and are citizens of the State of Oregon.

That James Cross and Francis E. Cross are husband and wife and are citizens of the State of Oregon.

That P. May Wilson and John T. Wilson are husband and wife and are citizens of the State of Illinois.

That Edwin C. Cross and Frank Cross and Adelia Cross are each of them citizens of the State of Oregon; that Adelia Cross is the widow of Thomas Cross, deceased, and said Frank Cross is a minor, under the age of eighteen years.

That all of said persons above named, save and except the widow Adelia Cross, are heirs-at-law of Thomas Cross and Pluma F. Cross, both now deceased.

That John G. Wright and Edwin C. Cross are citizens of the State of Oregon and are the duly appointed, qualified, and acting administrators of the estate of said Thomas Cross, deceased.

That the defendant, C. H. Lewis, is and at all times herein mentioned was a citizen of the State of Oregon; that at all times hereinafter mentioned your orator, L. H. Allen, and the defendant, C. H. Lewis, were copartners together, doing business under the firm name of Allen & Lewis; that on November 1st, 1871, Thomas Cross and Pluma F. Cross were husband and wife.

That on said November 1st, 1871, the said Thomas Cross, for value

received, made, executed, and delivered to said firm of Allen & Lewis his, said Cross', certain promissory note, in which and whereby he promised to pay to the order of Allen & Lewis, in three years after said date last named, the sum of thirty thousand
6 ($30,000.00) dollars in United States gold coin, with interest thereon, payable semi-annually, at the rate of ten per cent. per annum, from the date of said note.

That thereupon, on said November 1st, 1871, the said Thomas Cross, and Pluma F. Cross, his wife, in order to secure the payment of said promissory note and interest, did duly make, sign, seal, stamp, acknowledge, and deliver to said Allen & Lewis their certain deed of mortgage, in which and whereby they did mortgage to the said Allen & Lewis, their heirs, executors, administrators, and assigns, all of the following-described real property, all being, lying, and situate in the county of Marion, State of Oregon, to wit:

First. The donation land claim of Jeremiah Stevenson, being parts of sections numbered 21 and 22, in township 6 south, range three west, of the Willamette meridian, known in the land office as claim No. 65, notification No. 549, containing three hundred and twenty acres, more or less.

Second. The donation land claim of Albert Kendall and wife, being the N. E. $\frac{1}{4}$ of section 22, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 22, the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 22, in T. 6 S., R. 3 W., known in the land office as the claim embraced in certificate No. 517, notification No. 7337, containing three hundred and twenty acres.

Third. A part of the donation land claim of Wm. Canough and wife, in township 6 S., R. 3 W., known at the land office as claim No. 64, notification 552, and the part mortgaged being described as commencing 26.44 chains south and 25.50 chains west of the N. E. corner of section 16, in said township; thence S. 89° N. E. 21.81 chains; thence S. 0° 30″ W. 20 chains; thence S. 89° 17″ E. 20.00 chains; thence S. 0° 30′ west 20.45 chains; thence S. 77° 30′ W. 44.81 chains; thence N. 20 E. 51.50 chains to the place of
7 beginning, containing one hundred and fifty seven & $\frac{30}{100}$ acres.

Fourth. A part of the donation land claim of Alvis Smith and wife, in T. 6 S., R. 3 W., known at the land office as claim No. 69, notification No. 406, commencing at a stake on the line between the Alvis Smith and the Albert Kendall claims, on the north side of a lake; thence west 52.00 chains to a stake; thence south two rods to the lake; thence by the bank or meanderings of the lake to the place of beginning, being all said Smith claim between said lines and the lake and Kendall claim, containing twenty-three and $\frac{10}{100}$ acres, more or less.

Fifth. In section 16, T. 6 S., R. 3 W., tracts 3, 4, and 9, containing sixty-eight and $\frac{45}{100}$ acres, more or less.

Sixth. Indemnity school lands in section 21, town. 6 S., R. 3 west tracts 6, 8, 9, and 10, containing seventy-four and $\frac{36}{100}$ acres of land, more or less.

Seventh. Indemnity school lands in section 22, T. 6 S., R. 3 N.,

tracts 1, 2, 3, 4, and 5, and the S. W. ¼ of the S. W. ¼, containing one hundred and forty-eight and $\frac{28}{100}$ acres, more or less.

Eighth. A part of the donation land claim of Alexander Spong and his wife, the mortgaged property being described as situate in section 21, T. 6 S., R. 3 W., and is bounded and described as follows: Commencing in the west line of the donation land claim of Aron Purdy four chains north from where said west line intersects the south line of said section 21, thence N. 72° 30″ W. 15.10 to the east bank of the Willamette river; thence down the said east bank of said river, with the meanders thereof, to a point where the half section line running east and west dividing said section 21 intersects said east bank of said river; thence east along said half section
8 line to the west boundary line of the Jeremiah Stevenson donation claim; thence south 11.91 chains along the said Stevenson claim west boundary line to the southwest corner of the Stevenson claim; thence east along the south boundary line of the said Stevenson claim to a point 20.00 chains west from the east line of said section 21; thence south 8.09 chains to the north boundary line of the said Aaron Purdy claim; thence west on the northern boundary line of said Purdy claim 40.00 chains to the N. W. corner of the said Purdy claim; thence south 16.00 chains to the place of beginning, containing seventy-one acres, more or less, save and except all the timber lying north of the south line of the aforesaid Stephenson claim, if extended to the east bank of the aforesaid river.

Ninth. Indemnity school lands described as the W. ½ of the N. W. ¼ and the N. ½ of the N. ½ of the S. W. ¼, and lot No. 2, in section 10, and lots Nos. 1, 2, and 3, in section 4, all in township 6 S., R. 3 W., Willamette meridian, containing three hundred and thirty-four and $\frac{89}{100}$ acres.

Tenth. The donation land claim of Aaron Purdy and Belinda Purdy, his wife, situate in township 6 south, range 3 west, bounded and described as follows: The east ½ of the west ½ and the east ½ of section 28, the S. E. ¼ of the S. W. ¼ and the S. ½ of the S. E. ¼ of section 21, the fractional west ½ of the S. W. ¼ (lots 3 and 4) of section 27, containing six hundred and thirty and $\frac{48}{100}$ acres, more or less.

Eleventh. The donation land claim of Georgie B. Wagnon and wife, situate in T. 6 S., R. 3 W., described as follows: The south ½ of lot 3 and all of lot 4, section 9; the south ½ of the S. W. ¼ and the south ½ of the north ½ of the S. W. ¼ of section 10, and the north ½ of the northwest quarter, and lots 1 and 2, in section 15, containing three hundred and seventeen acres, more or less.

9 Twelfth. The donation land claim of John Baum and Phebe S. Baum, his wife, certificate No. 2757, notification No. 632, described as follows: The W ½ and N. W. ¼ of N. E. ¼, and lots Nos. 1, 2, 3, 4, and 5 of section 7, and lots 1, 2, 3, 4, 5, and 6 of section 8, all in T. 8 S., R. 2 W., containing six hundred and fifteen and $\frac{76}{100}$ acres of land, more or less.

Thirteenth. The north half of the donation land claim of William H. Rector and Ann Rector, his wife, said claim being desig-

nated at the land office as "claim" No. 45, and embracing parts of sections 7, 8, 17, and 18, in T. 8 S., R. 2 W., the said north half of said claim containing three hundred and twenty acres, more or less.

Fourteenth. A part of the donation land claim of David Leslie and wife, situate in T. 7 S., R. 3 W., of the Willamette meridian, known as claim No. 45, the part intended to be conveyed by said mortgage being therein described as being bounded and described as commencing at a point in the south boundary line of said claim 6.25 chains S. 89° 30′ W. from the S. E. corner of said claim, running thence N. 1° 00′ E., parallel to the east line of said claim, 8.05 chains; thence east 10.83 chains (the last 4.58 chains of this line being along the south line of the land of said claim); thence N. 0° 30′ E. 17.06 chains; thence west 35.07 chains; thence S. 2° 30′ W. 25.30 chains to the south line of the claim; thence N. 89° 30′ E., along the south line of the claim, 25.27 chains to the place of beginning, containing eighty acres of land, more or less.

Fifteenth. The donation land claim of F. S. Hoyt and wife, the same being known in the land office as notification No. 69 and claim No. 53, in T. 7 S., R. 3 W., containing one hundred and thirty-one acres, more of less, together with all the tenements, hereditaments, and appurtenances to said lands belonging.

That the condition of said mortgage was such that if the
10 said Thomas Cross should well and truly pay the said promissory note hereinbefore mentioned, principal and interest, according to its form and tenor, then the said mortgage should be void; but if default should be made in the payment of the principal or interest on said note, then the said mortgagees therein, their heirs or assigns, were authorized and empowered to foreclose said mortgage and sell the property therein described, and from the proceeds thereof to pay the amount due on said note and all costs and disbursements of suit and costs and expenses of sale.

That it was in and by said mortgage further expressly provided that in the event of a foreclosure of said mortgage and sale of said mortgaged property that the tracts therein in said mortgaged and herein numbered as fourteenth and fifteenth should be sold separately, and that said tracts should not at all be sold if sufficient should be realized from the sale of the other property therein described to pay the full amount due on said note and the costs, disbursements, and expenses of foreclosure and sale.

That thereafter, to wit, on the 3rd day of November, A. D. 1871, the said mortgage was duly recorded at pages 71, 72, 73, and 74 of Book No. 6 of Records of Mortgages for the County of Marion, State of Oregon.

And your orator avers that said promissory note is long past due and owing; that no part thereof has been paid save and except the interest thereon to November 1st, 1875, and the following on account of the interest accrued thereon, to wit, $887.37 on January 1st, 1877; $664.60 on December 12th, 1877; $242.25 on January 29th, 1878; $938.00 on February 2nd, 1880, and $869.49 on December 22nd, 1881.

That there is now long past due and owing on said note the sum

of $45,137.04 and interest thereon, at the rate of ten per cent.
11 per annum, from December 22nd, 1881.

That the said Pluma F. Cross departed this life on or about the 16th day of September, 1872; that after her said demise the said Thomas Cross was married to the defendant, Adelia Cross.

That Thomas Cross departed this life on February 5th, 1884.

That the said defendants, John G. Wright and Edwin C. Cross, administrators of the estate of said Thomas Cross, deceased, have assets in their hands applicable to the payment of the promissory note hereinbefore mentioned.

That after the said administrators had duly qualified as such, and heretofore, the said claim and demand of your orator against said Thomas Cross, deceased, was duly presented to said administrators, as by law required, and within six months after the death of said Thomas Cross.

That the said claim of your orator was by said administrators, on July 8th, 1884, rejected, and their said rejection was endorsed on said claim, as by law directed.

That after said presentation of said claim to said administrators, and heretofore, the said Allen & Lewis, for a valuable consideration to them paid by your orator, duly endorsed and delivered so endorsed to your orator the promissory note hereinbefore mentioned, and did thereafter and heretofore, for such valuable consideration, make, execute, and deliver to your orator an assignment of said mortgage hereinbefore mentioned.

And your orator, further complaining unto your honors, does further and separately and for other and different complaint aver and show—

That the defendant, Thomas Cross, did heretofore, to wit, on the
12 23rd day of January, A. D. 1872, duly make, execute, stamp, and deliver to L. H. Allen and C. H. Lewis his certain promissory note, in which and whereby he did, for value by him received, promise to pay to the order of L. H. Allen and C. H. Lewis, in one year after said last-named date, the sum of ten thousand ($10,000.00) dollars, with interest thereon from the date of said note, at the rate of one per cent. per month, until paid.

That in order to secure the payment of the said promissory note the said Thomas Cross, together with his then wife, Pluma F. Cross, did, on the 25th day of January, A. D. 1872, duly make, sign, seal, stamp, acknowledge, and deliver to said L. H. Allen and C. H. Lewis their, the said Thomas and Pluma F. Cross', deed of mortgage, in which and whereby they did mortgage to said L. H. Allen and C. H. Lewis all of the property hereinbefore described, and also the following-described property, to wit: The S. half of block 30, in the city of Salem, Marion county, State of Oregon; also parts of lots 1 and 2, in block 20, situate in the city of Salem, Marion county, Oregon, and described as commencing at a point on the north line of lot No. one aforesaid 60 feet E. of the N. W. corner of said lot one, thence S. at right angles to the S. line of lot No. two aforesaid; thence E. 22 feet 6 inches; thence N. at right angles to the N. line of said lot one; thence W. 22 feet 6 inches to the place of beginning;

also lot No. 3, in said block No. 20, save and except the following-described portion of said lot No. 3: Commencing at the N. W. corner of said lot No. 3, thence S. along the W. line of said lot No. 3 20 feet; thence E. 60 feet parallel with N. line of said lot No. 3; thence N. at right angles 20 feet; thence W. 60 feet to the place of beginning; the said mortgage conveying with said properties all tenements, hereditaments, and appurtenances thereto belonging or in anywise appertaining.

That the condition of said mortgage was such that if the said
13 Thomas Cross should well and truly pay the promissory — hereinbefore last described, principal and interest, according to the terms of said note, then the said mortgage should be void; but if default should be made, then the said L. H. Allen and C. H. Lewis or their legal representatives might foreclose said mortgage according to law.

That said mortgage was thereafter, to wit, on the 29th day of January, A. D. 1872, duly recorded at pages 141, 142, and 143 of Book No. 6 of Records of Mortgages for Marion County, State of Oregon.

That said promissory note is long past due and owing, and that no part thereof has been paid save and except the interest thereon to January 25, 1879, and the further sum of $1,686.35 paid on account of accrued interest on February 1st, 1883.

That there is now past due and owing on said note the sum of ten thousand dollars, with interest thereon from January 25th, 1879, at one per cent per month, less the sum of $1,686.35 paid on account of said interest.

That the defendants, John G. Wright and Edwin C. Cross, administrators, as hereinbefore alleged, have assets in their possession to said estate belonging which are applicable to the payment of the amount due on said last-mentioned note.

That the said claim and demand has been duly presented to said administrators, as by law required, and was by them heretofore rejected and their rejection by them duly endorsed on said claim and the proof thereof.

That after the presentation of said claim, and heretofore, the said C. H. Lewis, for a valuable consideration to him in hand paid by your orator, did sell and endorse and, so endorsed, deliver to your orator the said promissory note last mentioned and all his, said Lewis', rights and interests therein, and did also thereafter, for a valuable consideration, duly assign to your orator the said
14 mortgage herein last described; and your orator further avers and shows that on and before the 22nd day of January, A. D. 1876, the said Thomas Cross was the husband of C. M. Cross, who thereafter, and prior to the marriage of said Thomas Cross to Adelia Cross, departed this life or became divorced from said Thomas Cross.

That upon the said 22nd day of January, A. D. 1876, the said Thomas Cross was indebted and owing upon said promissory notes hereinbefore mentioned; that all of said mortgaged properties, except the property in the city of Salem are now and were upon said last-named dates farming and agricultural lands and large portions

thereof were and are under cultivation; that upon said 22nd day of January, 1876, the said Thomas Cross and his then wife, C. M. Cross, duly made, executed, acknowledged, and delivered to the defendant, C. H. Lewis, who was then a part owner of said notes and mortgages hereinbefore mentioned, an instrument upon its face purporting to be an absolute deed of warranty to all the property hereinbefore described and subject only to the mortgage herein first mentioned.

That said deed was thereafter, on the 28th day of January, 1876, duly recorded at pages 576, 577, 578, and 579 of Book No. 18 of Records of Deeds for Marion County, State of Oregon.

That although so absolute upon its face the said deed was intended by the parties thereto and in fact was a deed in trust to said C. H. Lewis for and upon the following trusts: That said C. H. Lewis should, at the cost and expense of said lands, keep the same in cultivation or lease or let the same or any part thereof; to sell and dispose of the crops, and collect the rents, and to apply the same upon said mortgage debts of said Thomas Cross hereinbefore
15 mentioned; that it was also understood and agreed between the parties to said deed that said C. H. Lewis might at any time sell any portion or portions of said lands at private sale with the consent of said Thomas Cross, and upon such sales to apply the proceeds towards the liquidation of the amount due on said notes as aforesaid.

And your orator avers that much of said mortgaged property is let and cultivated and that most of the rental obtained from said lands is in shares or proportions of the crops raised thereupon; that the season for harvesting said crops and for obtaining and collecting the rental of said lands is rapidly approaching, and that there is no proper person to collect and receive and receipt for the same.

That upon a sale of all of said mortgaged property the same will not realize sufficient to pay your orator's demands.

That it is to the best interest of your orator and of all the defendants herein that a provisional receiver be appointed herein to collect, take, receive, and receipt for all rents arising from said lands, and where necessary, to reduce said rents to money, and to care for the proceeds of such sales pending this suit and the application by your honor of the monies so to be derived therefrom.

That it is for the benefit and best interest of all concerned that much of said lands be at once let or leased, pending this suit, in order that the said lands may receive proper care and be made to realize pending this suit and during the coming season.

That all of said properties herein described are in need of care and attention generally; that unless a receiver is appointed and the care suggested bestowed upon said properties your orator fears and he alleges that said lands will greatly depreciate in value and much diminish your orator's securities.

16 And your orator further shows that each and all of the defendants herein named claim some interest in or lien upon some or all of the property herein described.

And your orator further avers that the interest or lien of each and all of said defendants is long subsequent in point of time and is subject to each and both of your orator's mortgages hereinbefore mentioned.

Any your orator prays that your honors will appoint immediately upon the filing of this your orator's bill of complaint some suitable and qualified person to take charge of and protect the properties hereinbefore described pending this suit or until otherwise ordered by your honors.

And that each and all of the defendants herein may answer the premises, and that an account be taken, under the direction and decree of this honorable court, of what is due and owing to your orator for principal monies and interest on the security of said mortgaged premises; and that the defendants and each and all of them, and all persons claiming by, through, or under them or either of them, may be absolutely barred and foreclosed of and from all right and equity in and to the said mortgaged premises and every part thereof save only of the statutory right to redeem.

That a sale may by final decree herein be ordered of said mortgaged premises in accordance with the terms and conditions of said mortgages; that after the payment of the costs and disbursements of this suit and costs and expenses of sale that so much thereof as may be necessary from the remainder of the proceeds of said mortgaged premises be decreed to be pay- unto your orator, and that your orator may have such other and further relief in the premises as the nature of his case shall require and to your honors shall seem meet; and may it please your honors to grant unto your ora-
17 tor the most gracious writ of subpœna of the United States of America, to be directed to each and all of the above-named defendants, thereby commanding them and each and every of them, under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand, to perform, and abide such order and decree therein as your honors shall deem agreeable to equity and good conscience; and your orator shall ever pray.

L. H. ALLEN,
Complainant.

M. W. FECHHEIMER AND
HENRY ACH,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss.*:

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys and solicitors for the complainant in the above-entitled suit; that said complainant is not within the district of Oregon, which is the reason why I make this affidavit.

That the foregoing bill of complaint is true, as I verily believe.

HENRY ACH.

thereof were and are under cultivation; that upon said 22nd day of January, 1876, the said Thomas Cross and his then wife, C. M. Cross, duly made, executed, acknowledged, and delivered to the defendant, C. H. Lewis, who was then a part owner of said notes and mortgages hereinbefore mentioned, an instrument upon its face purporting to be an absolute deed of warranty to all the property hereinbefore described and subject only to the mortgage herein first mentioned.

That said deed was thereafter, on the 28th day of January, 1876, duly recorded at pages 576, 577, 578, and 579 of Book No. 18 of Records of Deeds for Marion County, State of Oregon.

That although so absolute upon its face the said deed was intended by the parties thereto and in fact was a deed in trust to said C. H. Lewis for and upon the following trusts: That said C. H. Lewis should, at the cost and expense of said lands, keep the same in cultivation or lease or let the same or any part thereof; to sell and dispose of the crops, and collect the rents, and to apply the same upon said mortgage debts of said Thomas Cross hereinbefore
15 mentioned; that it was also understood and agreed between the parties to said deed that said C. H. Lewis might at any time sell any portion or portions of said lands at private sale with the consent of said Thomas Cross, and upon such sales to apply the proceeds towards the liquidation of the amount due on said notes as aforesaid.

And your orator avers that much of said mortgaged property is let and cultivated and that most of the rental obtained from said lands is in shares or proportions of the crops raised thereupon; that the season for harvesting said crops and for obtaining and collecting the rental of said lands is rapidly approaching, and that there is no proper person to collect and receive and receipt for the same.

That upon a sale of all of said mortgaged property the same will not realize sufficient to pay your orator's demands.

That it is to the best interest of your orator and of all the defendants herein that a provisional receiver be appointed herein to collect, take, receive, and receipt for all rents arising from said lands, and where necessary, to reduce said rents to money, and to care for the proceeds of such sales pending this suit and the application by your honor of the monies so to be derived therefrom.

That it is for the benefit and best interest of all concerned that much of said lands be at once let or leased, pending this suit, in order that the said lands may receive proper care and be made to realize pending this suit and during the coming season.

That all of said properties herein described are in need of care and attention generally; that unless a receiver is appointed and the care suggested bestowed upon said properties your orator fears and he alleges that said lands will greatly depreciate in value and much diminish your orator's securities.

16 And your orator further shows that each and all of the defendants herein named claim some interest in or lien upon some or all of the property herein described.

And your orator further avers that the interest or lien of each and all of said defendants is long subsequent in point of time and is subject to each and both of your orator's mortgages hereinbefore mentioned.

Any your orator prays that your honors will appoint immediately upon the filing of this your orator's bill of complaint some suitable and qualified person to take charge of and protect the properties hereinbefore described pending this suit or until otherwise ordered by your honors.

And that each and all of the defendants herein may answer the premises, and that an account be taken, under the direction and decree of this honorable court, of what is due and owing to your orator for principal monies and interest on the security of said mortgaged premises; and that the defendants and each and all of them, and all persons claiming by, through, or under them or either of them, may be absolutely barred and foreclosed of and from all right and equity in and to the said mortgaged premises and every part thereof save only of the statutory right to redeem.

That a sale may by final decree herein be ordered of said mortgaged premises in accordance with the terms and conditions of said mortgages; that after the payment of the costs and disbursements of this suit and costs and expenses of sale that so much thereof as may be necessary from the remainder of the proceeds of said mortgaged premises be decreed to be pay- unto your orator, and that your orator may have such other and further relief in the premises as the nature of his case shall require and to your honors shall seem meet; and may it please your honors to grant unto your ora-
17 tor the most gracious writ of subpœna of the United States of America, to be directed to each and all of the above-named defendants, thereby commanding them and each and every of them, under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand, to perform, and abide such order and decree therein as your honors shall deem agreeable to equity and good conscience; and your orator shall ever pray.

L. H. ALLEN,
Complainant.

M. W. FECHHEIMER AND
HENRY ACH,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Oregon, } ss:

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys and solicitors for the complainant in the above-entitled suit; that said complainant is not within the district of Oregon, which is the reason why I make this affidavit.

That the foregoing bill of complaint is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this the 6th day of August, A. D. 1884.

J. B. THOMPSON,
Notary Public for Oregon.

[SEAL.]

(Endorsed:) Filed August 6, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

18 And afterwards, to wit, on the 6th day of August, 1884, there was duly filed in said court an order to show cause in words and figures as follows, to wit:

19 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
against
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; Caroline M. Wright and John G. Wright, Her Husband; Wm. T. Cross and Christina Cross, His Wife; P. May Wilson and John T. Wilson, Her Husband; Edwin C. Cross, James Cross and Francis E. Cross, His Wife; Frank Cross, a Minor; Adelia Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

On reading and filing of the bill of complaint herein, and on motion of Mr. Henry Ach, of solicitors for complainant, it is ordered that the defendants, John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and the defendant, C. H. Lewis, do appear herein in this court and cause on the 18th day of August, A. D. 1884, and show cause, if any they have, why a receiver should not be appointed herein in accordance with the request in complainant's bill herein filed. Let a copy of this order be served at least ten days before the said 18th day of August, A. D. 1884, on the said John G. Wright, Edwin C. Cross, and C. H. Lewis.

DEADY, *J.*

(Endorsed:) Filed August 6, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

20 DISTRICT OF OREGON, *ss:*

I certify that on the 9th day of August, 1884, at Salem, Marion county, in said district, I duly served the within order to show cause upon the therein-named Edwin C. Cross by delivering to him personally a true copy of said order, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy.*

21 DISTRICT OF OREGON, *ss:*

I certify that on the 11th day of August, 1884, at Wilhoit Springs, Clackmas county, in said district, I duly served the within order to show cause upon the therein-named John G. Wright by delivering to him personally a true copy of said order, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy.*

22 DISTRICT OF OREGON, *ss:*

I certify that on the 16th day of August, 1884, at Portland, Multnomah county, in said district, I duly served the within order to show cause upon the therein-named C. H. Lewis by delivering to him personally a true copy of said order, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By C. W. FRUSH, *Deputy.*

23 And afterwards, to wit, on the 7th day of August, 1884, there was issued out of said court a *subpœna ad respondendum* in words and figures as follows, to wit:

24 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant, *vs.* ELIZA O'DONALD, JONATHAN O'DONALD, Her Husband; William T. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross, and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.	No. —. In Equity. *Subpœna ad Respondendum.*

The President of the United States of America to the above-named defendants, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room

thereof, in the city of Portland, in said district, on the first Monday of September next, which will be the first day of September, A. D. 1884, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein L. H. Allen is complainant and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf; and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our [SEAL.] said circuit court, affixed at Portland, in said district, this 7th day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

R. H. LAMSON, *Clerk*,
By G. G. GAMMONS,
Deputy Clerk.

MEMORANDUM.—Pursuant to equity rule No. 12 of the Supreme Court of the United States the defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

(Endorsed:) Filed Sept. 2d, 1884. R. H. Lamson, clerk.

[Endorsed:] No. —. In the circuit court of the United States for the district of Oregon. In equity. —— —— *vs.* —— ——. *Subpœna ad respondendum.* Returned and filed ——, 188–. —— ——, clerk, by —— ——, deputy clerk.

25 DISTRICT OF OREGON, *ss:*

I certify that on the 22nd day of August, 1884, at Salem, Marion county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named Caroline M. Wright by exhibiting said writ to her and by delivering to her personally a true copy of said writ, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy*.

26 DISTRICT OF OREGON, *ss:*

I certify that on the 22nd day of August, 1884, at Salem, Marion county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named Christina Cross by exhibiting said

writ to her and by delivering to her personally a true copy of said writ, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy.*

27 DISTRICT OF OREGON, *ss:*

I certify that on the 22nd day of August, 1884, at Salem, Marion county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named William F. Cross by exhibiting said writ to him and by delivering to him personally a true copy of said writ, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy.*

28 DISTRICT OF OREGON, *ss:*

I do hereby certify that after making careful and diligent search for the within-named James Cross that I failed to find him in this district, and that I did serve the within *subpœna ad respondendum* upon the said James Cross by leaving a copy thereof, duly certified to by me as U. S. marshal, at the place of residence and usual place of abode of the said James Cross, in the town of Albina, in the county of Multnomah and State of Oregon, with Francis E. Cross, a person over 14 years of age, the wife of the said James Cross, on the 22d day of August, 1884.

PENUMBRA KELLY,
U. S. Marshal,
By C. W. TRUSH, *Deputy.*

29 DISTRICT OF OREGON, *ss:*

I certify that on the 21st day of August, 1884, at Albina, Multnomah county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named Francis E. Cross by exhibiting said writ to her and by delivering to her personally a true copy of said writ, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By C. W. TRUSH, *Deputy.*

30 DISTRICT OF OREGON, *ss:*

I certify that on the 16th day of August, 1884, at Portland, Multnomah county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named C. H. Lewis by exhibiting said writ to him and by delivering to him personally a true copy of said writ, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By C. W. TRUSH, *Deputy.*

31 DISTRICT OF OREGON, *ss:*

I certify that on the 15th day of August, 1884, at Salem, Marion county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named Eliza O'Donald, Jonathan O'Donald, and Frank Cross by exhibiting said writ to each of them and by delivering to each of them personally a true copy of said writ, duly certified to me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By EUGENE H. BRISTOW, *Deputy.*

32 DISTRICT OF OREGON, *ss:*

I certify that on the 11th day of August, 1884, at Wilhoit Springs, Clackmas county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named John G. Wright by exhibiting said writ to him and by delivering to him personally a true copy of said writ, duly certified to by me as U. S. marshal, together with a copy of the complaint in the within-entitled suit, duly certified to by the clerk of the circuit court for said district.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy.*

33 DISTRICT OF OREGON, *ss:*

I certify that on the 9 day of August, 1884, at Salem, Marion county, in said district, I duly served the within *subpœna ad respondendum* upon the therein-named Edwin C. Cross by exhibiting said writ to him and by delivering to him personally a true copy of said writ, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
United States Marshal,
By M. G. HARBORD, *Deputy.*

34 And afterwards, to wit, on Monday, the 18th day of August, 1884, the same being the 55th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

35 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

AUGUST 18, 1884.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and the defendants, John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross,

deceased, by Mr. William Holmes, of counsel; and it appearing to the court that this is the time heretofore fixed for the hearing upon the order to show cause why a receiver should not be appointed herein, but that the said defendants, administrators as aforesaid, have not been served with copies of said order for the length of time required therein: Now, therefore, upon motion of plaintiff, the said defendants, by their said counsel, consenting thereto, it is ordered that said cause be, and the same is hereby, set for hearing on Monday next, the 25th inst., upon said order to show cause.

DEADY, *J.*

(Endorsed:) Filed August 18, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

36 And afterwards, to wit, on the 23rd day of August, 1884, there was duly filed in said court an application for order that certain defendants appear in words and figures as follows, to wit:

37 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
against
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William T. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

And now comes the above-named complainant, by his attorneys, Messrs. Fechheimer & Ach, and makes and files herein the following application, and avers and shows—

That this is a suit on the part of said complainant to enforce and foreclose certain mortgage liens by him held upon lands situate in Marion county, Oregon, and within the district of Oregon.

That the defendants, P. May Wilson and John T. Wilson, are necessary and proper defendants in this suit, and neither of them is within this district, but they are and ever since the commencement of this suit have been residents and inhabitants of Earlville,
38 in the State of Illinois; that neither of said defendants last named is an inhabitant of the district of Oregon, nor can they be found therein.

That the defendant, Adelia Cross, is a necessary and proper defendant in this suit, and is not an inhabitant of the district of Oregon, nor can she be found therein; that said Adelia Cross is an inhabitant and resident of Fort Madison, in the State of Iowa; that this suit was commenced herein on the 6th day of August, A.

D. 1884; that neither said Adelia Cross nor said John T. Wilson nor said P. May Wilson have voluntarily or at all appeared herein.

That the lands in the complaint herein described are in the possession of the following-named persons, to wit: Henry Clark, Frank Tooze, R. Reed, William David, J. Phillips, Mrs. A. F. Cox, Charles Cox, Mrs. Geo. Titus, A. L. Savage, Edwin C. Cross, and D. C. Howard.

Wherefore your applicant, the complainant herein, respectfully prays that an order be made herein requiring and directing the said P. May Wilson, John T. Wilson, and Adelia Cross, the said absent defendants, to appear, plead, answer, or demur herein in this suit on a day certain in said order to be mentioned; and, further, that an order be made directing the service of said order upon the persons now in possession of lands, as alleged.

FECHHEIMER & ACH,
Solicitors for Complainant.

STATE OF OREGON, }
County of Multnomah, } ss:

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys for the complainant in the above-entitled suit; that said complainant is not within this district of Oregon, which is the reason why I make this affidavit; and I further say that the
39 foregoing application is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this 22nd day of October, A. D. 1884.

J. B. THOMPSON,
[SEAL.] *Notary Public for Oregon.*

(Endorsed:) Filed Aug. 23, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

40 And afterwards, to wit, on the 25th day of August, 1884, there was duly filed in said court a consent to appointment of a receiver in words and figures as follows, to wit:

41 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; CAROLINE E. WRIGHT and JOHN G. WRIGHT, Her Husband; Wm. T. Cross and Christina Cross, His Wife; P. May Wilson and John T. Wilson, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, and Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

And now comes the defendant, C. H. Lewis, in his own proper person, and hereby expressly assents to the appointment of a receiver herein, as prayed for in the bill of complaint.

C. H. LEWIS.

(Endorsed:) Filed Aug. 25, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

42 And afterwards, to wit, on Monday, the 25th day of August, 1884, the same being the 58th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

43 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHON O'DONALD, Her Husband; William T. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

AUGUST 25, 1884.

Now, at this day, came on to be heard the application of the complainant for the appointment of a receiver herein and as prayed for in his bill of complaint herein, and was argued by Mr. Henry Ach for the complainant and by Mr. William H. Holmes for John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and it appearing that the defendant, C. H. Lewis,

has filed herein his stipulation assenting to the appointment of a receiver, as prayed for in said bill of complaint, it is ordered that a receiver be appointed; and, the said parties in open court
44 consenting that Mr. John C. Lewis be appointed by the court as such receiver, it is further ordered that Mr. John C. Lewis be, and he hereby is, appointed as receiver in this suit to take, collect, receive, and receipt for all rents and profits of the real property in the bill of complaint herein described, and, if received in products of said lands, to convert the same to money, and, pending the further order of this court, to deposit all moneys by him so received from said lands in the First National Bank of Portland, Oregon, taking certificates of deposit therefor, which said certificates shall by him be deposited with the clerk of this court; also to let and lease, for such rental as he may deem proper, for terms not longer than one year, all of the lands in the said bill of complaint described, and generally to care for and, if deemed necessary or advantageous, to cultivate any or all of said lands. It is further ordered that said receiver shall file herein quarterly reports of his doings as such receiver, and that he shall, before entering upon his duties, file with the clerk of this court a bond, with sureties to be approved by the master, in the sum of ten thousand dollars, conditioned for the faithful performance of his duties as such receiver.

DEADY, *J.*

(Endorsed:) Filed Aug. 25, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

45 And afterwards, to wit, on the 1st day of September, 1884, there was duly filed in said court an appearance of certain defendants in words and figures as follows, to wit:

46 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD *et al.*, Defendants.

To R. H. Lamson, clerk of the aforesaid court:

You will please enter *any* appearance in the above-entitled suit for the following-named defendants: Wm. F. Cross and Christina Cross, his wife; John G. Wright and Caroline M. Wright, his wife; Edwin C. Cross, Frank R. Cross, and John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased; James C. Cross and Francis E. Cross, his wife.

W. H. HOLMES,
Solicitor for said Def'ts.

(Endorsed:) Filed Sept. 1, 1884. R. H. Lamson, clerk.

47 And afterwards, to wit, on the 28th day of November, 1884, there was duly filed in said court order for service of process in words and figures as follows, to wit:

48 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHON O'DONALD, Her Husband; William T. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

On reading and filing of the application of the complainant above named for an order directing P. May Wilson, John T. Wilson, and Adelia Cross, defendants above named, to appear, plead, answer, or demur in this suit by a day certain, and on hearing of Mr. Henry Ach, attorney for complainant, it appearing that this is a suit to enforce a legal or equitable lien upon real property situate in the district of Oregon, and that the said defendants named are not inhabitants of and cannot be found within the district of Oregon and have not voluntarily appeared herein, and it also appearing
49 that said defendants, P. May Wilson and John T. Wilson, are now inhabitants and residents of Earlville, in the State of Illinois, and the defendant, Adelia Cross, is now an inhabitant and resident of Fort Madison, in the State of Iowa, it is ordered that said defendants, P. May Wilson, John T. Wilson, and Adelia Cross, and each of them do appear, plead, answer, or demur herein on or before the 2nd day of December, A. D. 1884.

And it is further ordered that a copy of this order be personally served upon each of said defendants, P. May Wilson, John T. Wilson, and Adelia Cross, wherever they may be found, and also upon Henry Clark, Frank Tooze, R. Reed, William David, J. Phillips, Mrs. A. F. Cox, Charles Cox, Mrs. Geo. Titus, A. L. Savage, Edwin C. Cross, and D. C. Howard, the persons now in the possession of the real property in the complaint herein described.

DEADY, *J.*

October 23d, 1884.

(Endorsed:) Filed Nov. 28, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy.

50 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I certify that on the 27th day of November, 1884, at Marion

county, in said district, I duly served the within order for appearance upon the therein-named defendants, Frank Tooze, Henry Clark, and William David (whose true name is Thomas David), by exhibiting said order to them and by delivering to each of them personally a true copy of said order, duly certified by me as U. S. marshal.

PENUMBRA KELLY,
U. S. Marshal,
By P. A. MARQUAM, JR., *Deputy.*

51 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I certify that on the 26th day of November, 1884, at Marion county, in said district, I duly served the within order for appearance upon the therein-named defendants, R. Reed, J. Phillips, Mrs. A. F. Cox, Charles Cox, Mrs. Geo. Titus, A. L. Savage, Edwin C. Cross, and D. C. Howard, by exhibiting said order to them and by delivering to each of them personally a true copy of said order, duly certified to by me as U. S. marshal.

PENUMBRA KELLY,
U. S. Marshal,
By P. A. MARQUAM, JR., *Deputy.*

52 UNITED STATES OF AMERICA, } ss:
District of Iowa, }

I certify that on the 14th day of November, 1884, at Fort Madison, in said district, I duly served the within order for appearance upon the therein-named defendant, Adelia Cross, by exhibiting said order to her and by delivering to her personally a true copy of said order, duly certified to by the U. S. marshal for the district of Oregon.

R. ROOT,
U. S. Marshal, Southern Dist. Iowa,
By HENRY FULTON,
Dept. U. S. M.

Service on 1	$2 00
Mileage from Des Moines, Iowa, 187, @ 6	11 22
1 copy	50
	$13 72

53 UNITED STATES OF AMERICA, } ss:
Northern District of Illinois, }

I certify that on the eighth day of November, 1884, 6 miles northeast of Earlville, La Salle county, in said district, I duly served the within order for appearance upon the therein-named defendants, P. May Wilson and John T. Wilson, by exhibiting said order to each of them and by deliver- to each of them personally a true copy of

said order, duly certified to by the U. S. marshal for the district of Oregon.

A. M. JONES, *U. S. Marshal.*
R. D. SHERMAN, *Deputy.*

2 service fees	4 00
2 copies	1 00
80 miles	4 80
	9 80

54 And afterwards, to wit, on the 12th day of December, 1884, there was duly filed in said court an appearance of defendant, Frank Cross, &c., in words and figures as follows, to wit:

55 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Plaintiff,
vs.
J. O'DONALD *et al.*, Def'ts. } No. —.

To the clerk of the above-entitled court:

You will please enter my appearance as solicitor in the above-entitled cause for the defendant, Frank Cross (a minor), and also for E. C. Cross, his guardian *ad litem.*

W. H. HOLMES,
Of Counsel for said Def'ts, E. C. and Frank Cross.

(Endorsed:) Filed Dec. 12, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy clerk.

56 And afterwards, to wit, on the 13th day of December, 1884, there was duly filed in said court an petition for guardian *ad litem* in words and figures as follows, to wit:

57 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; Caroline M. Wright and John T. Wright, Her Husband; Wm. T. Cross and Christina E. Cross, His Wife; P. May Wilson and John T. Wilson, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross and Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Deceased; Adelia Cross, Widow of Thomas Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

And now comes Frank Cross, a minor, above the age of fourteen years, one of the defendants herein, in his own proper person, and enters his appearance herein; and this defendant says—

That he is a minor of the age of eighteen years; that he has been duly and personally served with *subpœna ad respondendum* in this suit; that Edwin C. Cross, one of the defendants herein, is the duly appointed, qualified, and acting general guardian of the person and estate of this defendant; that no guardian *ad litem* for this de-
58 fendant has been named or appointed in this suit; that the interests of the said Edwin C. Cross in the subject-matter of this suit are not opposed or antagonistic to the interests of this defendant herein, and that it is necessary and convenient that a guardian *ad litem* for this defendant in this suit be appointed by the court.

Wherefore defendant prays an order of this honorable court appointing Edwin C. Cross guardian *ad litem* for this defendant herein.

FRANK CROSS,
By W. H. HOLMES,
His Counsel.

UNITED STATES, }
District and State of Oregon. }.

I, W. H. Holmes, being first duly sworn, say I am the att'y and counsel for Frank Cross, an infant, def't in the foregoing cause; that I am personally and well acquainted with E. C. Cross, the general guardian of Frank Cross, one of said def'ts; that said E. C. Cross is a fit and proper person to be appointed guardian *ad litem* for said Frank Cross to represent his interests in this suit; and I, affiant, further swear that the annexed and foregoing petition is true, as I believe.

W. H. HOLMES.

Subscribed and sworn to before me this 13th day of Dec., 1884.

F. B. THOMPSON,
[SEAL.] *Notary Public for Ore.*

(Endorsed:) Filed Dec. 13, 1884. R. H. Lamson, clerk.

59 And afterwards, to wit, on the 13th day of December, 1884, there was duly filed in said court an order appointing a guardian *ad litem* in words and figures as follows, to wit:

60 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JOHNATHAN O'DONALD, Her Husband; Caroline M. Wright and John G. Wright, Her Husband; Wm. T. Cross and Christina Cross, His Wife; P. May Wislon and John T. Wilson, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross and Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis.

On reading and filing of the application of the defendant, Frank

Cross, for the appointment of a guardian *ad litem* for him in this suit, on motion of Mr. Wm. H. Holmes, attorney for said defendant, it appearing that said Frank Cross, the defendant, is a minor above the age of fourteen years; and it also appearing by the affidavit herein filed of Wm. H. Holmes, Esq., attorney for said infant defendant, that Edwin C. Cross is the duly appointed guardian of said infant, and that he has no interests in this suit adverse to those of said infant defendant, and that he is a proper and fit person to be appointed guardian *ad litem* of said infant defendant in this suit, and it
61 appearing that it is necessary that a guardian *ad litem* be appointed herein for said infant defendant—

It is hereby ordered that said Edwin C. Cross be, and he hereby is, appointed guardian *ad litem* for said infant defendant, Frank Cross, in this suit.

DEADY, *J.*

At chambers, December 13, 1884.

(Endorsed:) Filed Dec. 13, 1884. R. H. Lamson, clerk.

62 And afterwards, to wit, on the 17th day of December, 1884, there was duly filed in said court an appearance in words and figures as follows, to wit:

63 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

To the clerk of the above-entitled court:

You will please enter *my* appearance as solicitor- in the above-entitled cause for the defendants, P. Mai Wilson and John T. Wilson.

W. C. PEPER AND
JOHN F. CAPLES.

(Endorsed:) Filed Dec. 17, 1884. R. H. Lamson, clerk, by G. G. Gammons, deputy clerk.

64 And afterwards, to wit, on Wednesday, the 21st day of January, 1885, the same being the 57th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

65 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

JANUARY 21, 1885.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. Henry Ach, of counsel, and moves the court for a decree *pro confesso* against the defendants, Eliza O'Donald, Jonathan O'Donald, William T. Cross, Christina Cross, Caroline M. Wright, John G. Wright, James Cross, Francis E. Cross, P. May Wilson, John T. Wilson, Adelia Cross, C. H. Lewis, and John G. Wright & Edwin C. Cross, administrators of the estate of Thomas Cross, deceased; and it appearing to the court that the said defendants have been duly served herein, and that they and each of them have failed to answer the bill herein within the time allowed by law, it is adjudged and decreed that the said bill be, and the same is hereby, taken as confessed by the said defendants.

DEADY, *J.*

(Endorsed:) Filed Jan. 21, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

66 And afterwards, to wit, on the 10th day of March, 1885, there was duly filed in said court an answer of defendants, Edwin C. Cross and Frank Cross, in words and figures as follows, to wit:

67 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD & JONATHAN O'DONALD, Her Husband; WILLIAM T. CROSS & CHRISTINA CROSS, His Wife; Caroline Wright & John T. Wright, Her Husband; James Cross & Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson & John T. Wilson, Her Husband, & Frank Cross, a Minor, Heirs-at-Law of Thomas Cross & Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, & John G. Wright & Edwin C. Cross, Administrators of Thomas Cross, Deceased, & C. H. Lewis, Defendants.

The joint and several answer of Edwin C. Cross and of Frank Cross, by Edwin C. Cross, his guardian *ad litem*, two of the defendants above named, to the bill of complaint of L. H. Allen, the above-named plaintiff.

These defendants, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, un-

certainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, saith:

68 Defendants admit that at all the dates and times herein mentioned, as alleged in said bill of complaint, complainant has been and still is a citizen of the State of California; admit that at all the times mentioned in said bill of complaint, up to the time of their decease, Thomas & Pluma F. Cross, were citizens of the State of Oregon; admit that Elizabeth & Jonathan O'Donald are husband and wife and citizens of the State of Oregon; admit that Caroline & John G. Wright are husband & wife and are citizens of the State of Oregon; admit that William F. Cross & Christina Cross are husband & wife and are citizens of the State of Oregon; admit that James & Francis Cross are husband and wife, and are citizens of the State of Oregon; admit that P. May Wilson and John T. Wilson are husband & wife and are citizens of the State of Illinois; admit that Edwin C. Cross and Frank R. Cross are citizens of the State of Oregon, and that Adelia Cross is the widow of Thomas Cross, deceased, and that Frank Cross is a minor and under the age of 18 years; admit that all the persons above named, save and except the widow Adelia Cross, are heirs-at-law of Thomas Cross, but deni*es* that all or any of said above-named persons (defendants) are heirs-at-law of Pluma Cross except said P. May Wilson and these defendants. Defendants admit that John G. Wright and Edwin C. Cross are citizens of the State of Oregon, and are the duly appointed, qualified, & acting administrators of the estate of Thomas Cross, deceased; admit that the defendant C. H. Lewis is and at all times mentioned in said bill of complaint — a citizen of the State of Oregon; admit that at all the times mentioned in said complaint said complainant and the defendant C. H. Lewis were copartners together, doing business under the firm name of Allen & Lewis.

69 Def'ts admit that on Nov. 1st, 1871, the said Pluma F. Cross & Thomas Cross were husband and wife; admit that on said Nov. 1st, 1871, the said Thomas Cross, for value received, made, executed, and delivered to said firm of Allen & Lewis his, said Cross', certain promissory note, in which and whereby he promised to pay to the order of Allen & Lewis, in three years after said date last mentioned, the sum of $30,000 in United States gold coin, with interest thereon payable semi-annually, at the rate of ten per cent. per annum, from the date of said note; admit that on said Nov. 1st, 1871, said Thomas Cross and Pluma F. Cross, in order to secure the payment of said note and interest, made the mortgage, as alleged in said complaint, on the lands therein described. Def'ts admit that the condition of the said mortgage was such that if the said Thomas Cross should well and truly pay the said *promise any* note hereinbefore mentioned, principal & interest, according to *its* form and tenor thereof, the said mortgage should be void; but if default should be made in the payment of principal or any interest on said note, then the said mortgagees therein, their heirs or assigns, were authorized and empowered to foreclose said mortgage and sell the property

therein described, and from the proceeds thereof to pay the amount due on said note and all costs and disbursements of suit and all costs and disbursements of sale. Defendants admit that it was in and by said mortgage expressly provided that in the event of foreclosure of said mortgage and sale of said mortgaged property that the tracts therein in said mortgage, and numbered in said complaint as 14 & 15, should be sold separately, and that said tracts should not at all be sold if sufficient should be realized from the sale of the other property therein described to pay the full amount due on said note and the costs, disbursements, & expenses of foreclosure and sale. Def'ts admit that said mortgage was duly recorded in Marion county, Oregon, as alleged in
70 said complaint. Def'ts admit that said promissory note is long past due and owing; that no part of the same has been paid except as alleged in said bill of complaint. Def'ts deny that there is long past due or due at all or owing on said note the sum of said $45,137.04, or interest thereon at the rate of ten per cent. per annum, or at any other rate, from Dec. 22nd, 1881, or from any other time or any other greater sum than $45,137.04 and interest on $30,000 since Dec. 22nd, 1881, at 10% per annum. Def'ts admit that the said Pluma Cross departed this life on or about the 16th day of Sept., 1872; that after her said death the said Thomas Cross was married to the def't, Adelia Cross; that said Thomas Cross departed this life on Feb. 5th, 1884; deny that the said def'ts, John G. Wright or Edwin Cross, administrators of the estate of the said Thomas Cross, deceased, have assets in their hands or in the hands of either applicable to the payment of the promissory note hereinbefore mentioned or any part thereof. Def'ts admit that after the said administrators had duly qualified as such, the said claim and demand of said complainant against said Thomas Cross, deceased, was duly presented to said administrators, as by law required, and within six months after the death of said Thomas Cross. Def'ts admit that the said claim of complainant was by said administrators, on July 8th, 1884, rejected and their said rejectance was duly endorsed on said claim, as by law directed. Def'ts admit that after said presentation of said claim to said administrators the said Allen & Lewis, for a valuable consideration to them paid by said complainant, duly endorsed, & delivered to the said complainant so endorsed, the promissory note hereinbefore mentioned, and did thereafter and heretofore, for such valuable consideration, make, execute, and deliver to said
71 complainant an assignment of said mortgage hereinbefore mentioned.

These defendants, for answer to said complainant's second cause of suit in said bill of complaint contained, saith:

Def'ts admit that Thomas Cross did heretofore, to wit, on the 23d day of Jan., A. D. 1872, duly make, execute, stamp, and deliver to L. H. Allen & C. H. Lewis his certain promissory note, in which and whereby he did, for value by him received, promise to pay to the order of L. H. Allen & C. H. Lewis, in one year, after said last-mentioned date, the sum of $10,000, with interest thereon from the date thereof, at the rate of one per cent. per month, until paid;

admit that in order to secure the payment of said promissory note the said Thomas Cross and Pluma Cross, his wife, made, executed, and delivered to said L. H. Allen and C. H. Lewis a deed of mortgage, as alleged in complainant's second cause of suit in said complaint, on the property therein described. Def'ts admit that the condition of said mortgage was such that if the said Thomas —— should well and truly pay the promissory note hereinbefore last described according to the terms thereof, then the said mortgage should be void; but if default should be made, then the said mortgagees or their legal representatives might foreclose said mortgage according to law.

Def'ts admit that said last-mentioned mortgage was duly recorded in Marion county, Oregon, as alleged in said second cause of suit. Def'ts admit that said promissory note is long past due and owing, and that no part thereof has been paid save and except the interest thereon to January 25th, 1879, and the further sum of $1,686.35, paid on account of interest, on Feb'y 1st, 1883. Def'ts admit there is now due and owing on said note the sum of $10,000, with interest thereon from Jan. 29th, 1879, at one per cent. per month,
72 less the sum of $1,686.35, paid on account of said interest. Def'ts deny that the def'ts, John G. Wright or E. C. Cross, administrators, as hereinbefore admitted, have or had assets in their hands or possession to said estate belonging which are applicable to the payment of the amount due on said last-mentioned note or any part thereof.

Def'ts admit the said claim and demand has been duly presented to said administrators, as by law required, and by them heretofore rejected and their rejectance by them duly endorsed on said claim and the proof thereof; admit that after the presentation of said claim the said C. H. Lewis, for a valuable consideration to him in hand paid by said complainant, did sell and endorse and so endorsed deliver to said complainant the said promissory note last mentioned and all his, said Lewis', rights and interests therein, and did also thereafter, for a valuable consideration, duly assign to said complainant the said mortgage herein last described.

Def'ts admit that said Thomas Cross was the husband of C. M. Cross, who thereafter and prior to the marriage of said Thomas Cross to Adelia Cross became divorced from said Thomas Cross. Def'ts admit that upon the said 22d day of January, A. D. 1876, the said Thomas Cross was indebted and owing upon said promissory notes hereinbefore mentioned. Def'ts admit that all of said mortgaged property except the property in the city of Salem are now and were upon said last-named dates farming and agricultural lands, and large portions thereof were and are under cultivation. Def'ts admit that on said 22d day of January, 1876, the said Thomas Cross and his then wife duly made, executed, acknowledged, and delivered to the defendant, C. H. Lewis, who was then a part owner of said notes & mortgages hereinbefore mentioned, an instrument upon its face purporting to be an absolute deed of warranty
73 to all the property described in said bill of complaint and subject only to the mortgage herein first mentioned. Def'ts

admit that said mortgage was duly recorded in Marion county, Oregon, as alleged in said bill of complaint. Def'ts deny that although so absolute upon its face the said deed was intended by the parties thereto or was in fact or at all a deed in trust to said C. H. Lewis for or upon the following alleged pretended trusts, that said C. H. Lewis should, at the cost or expense of said lands or any part thereof, keep the same in cultivation or lease or let the same or any part thereof, to sell or dispose of the crops or collect the rents, or to apply the same or any part thereof upon said mortgage debts of said Thomas Cross hereinbefore mentioned. Def'ts deny that it was also or at all understood or agreed between the parties to said deed that said C. H. Lewis might at any time or at all sell any portion or portions of said land at private sale or at all with the consent of the said Thomas Cross or, upon such alleged sales, to apply the proceeds towards the liquidation of the amounts due on said notes as aforesaid; deny that the interests or liens of these defendants is long or subject at all or subsequent in point of time or otherwise or is subject to each or either of complainant's mortgages.

And these defendants, by way of further and different answer to said complainant's bill of complaint, saith that at the time of the execution of the two mortgages described in complainant's bill, for a long time prior thereto, and continuously thereafter until her death the said Pluma F. Cross was the owner in fee simple of all that portion of said mortgaged premises designated & described in said bill as Nos. 14 & 15, and more particularly described as a part of the donation land claim of David Leslie and wife, situated in T.
74 7 S., R. 3 west, of the Willamette meridian, and known as claim 45, being bounded and described as commencing at a point in the south boundary line of said claim 6.25 chains S. 89° 30′ W. from the S. E. corner of said claim, running thence north 1° 00′ east parallel to the east line of said claim 8.05 chains; thence east 10.83 chains (the last 4.58 chains of this line being along the south line of the land of said claim); thence W. 0° 30′ E. 17.06 chains; thence west 35.07 chains; thence south 2° 30′ W. 25.30 chains to the south line of said claim; 25.27 chains to the place of beginning, containing eighty acres of land, more or less, situated in Marion county, Oregon; also the donation land claim of F. S. Heryt & wife, the same being known in the land office as not. No. 69 and claim No. 53, in T. 7 S., R. 3 west, containing one hundred and thirty-one acres, more or less, together with all the tenements, hereditaments, and appurtenances to said lands belonging, situated in said county of Marion & State of Oregon; that prior to the execution of said mortgages and both of them, as well as the promissory notes for the payment of which they were made to secure, the said firm of Allen and Lewis, mentioned in complainant's bill, had loaned to and advanced for and on account of said Thomas Cross, deceased, a large sum of money, to wit, about $60,000, which sum of money the said Thomas Cross was then unable to pay; that as soon as the said Allen & Lewis became aware of the inability of the said Cross to pay said demand they became exceedingly anxious to obtain security therefor, and to that end they importuned the said

Pluma Cross, who was the mother of these defendants, to mortgage her said lands and also to join her husband in the execution of the mortgages upon his own lands described in complainant's bill as security for the said debt of her husband, Thomas
75 Cross, and for no other purpose and for no other consideration; that the said Pluma Cross readily consented to join her husband in the execution of the mortgages upon his own lands, but for a long time objected to including her said lands in said mortgages as aforesaid or at all, but finally, through the importunity of said Allen & Lewis and their att'y, Wm. Gentry, Esq., and the importunity of her said husband and the assurance of all of them that the said lands of the said Thomas Cross were more than ample security for said debt, she consented to interpose her said lands as security only for said debt of her said husband, with the provision in the said mortgage contained; that in said mortgage it was expressly stipulated and agreed that in the event of a failure to pay said sum of money in the mortgage provided the said mortgage should be foreclosed in the manner provided by law; and the said def'ts saith that no other or different mode or manner of sale of said lands was provided or contemplated by the parties thereto; and these defendants further show to your honors that long after the death of the said Pluma Cross, as alleged in complainant's said bill, to wit, about the — day of November, 1876, the said Allen & Lewis, on the one part, and the said Thomas Cross, on the other part, entered into an agreement, in pursuance of which they sold, contrary to the terms and conditions of both of said mortgages, large bodies of the said mortgaged lands and each of them for the considerations hereinafter mentioned; executed the necessary deeds and releases thereto so as to place the fee thereof in the several purchases free and released from the liens of both of said mortgages—that is to say, to J. I. Thompson all that part of said land described as lots 53, 54, and 55, as known on the maps and plats of the Government surveys as lots Nos. 1, 2, & 3 of section 4, T. 7 S., R. 3 W., of the Wil-
76 lamette meridian, containing 187.68 acres; also lots Nos. 38, 39, 40, & 42, as known on the Thomas Cross maps and surveys recorded in Marion county, Oregon, in the county clerk's office of said county on the 14th day of November, 1876, and more particularly — as follows: Commencing 26.44 chains south and 25.50 chains west of the N. E. corner of section 16, in T. 6 S., R. 3 west, and running thence south 89° 17′ E. 21.81 chains; thence S. 00° 30′ W. 20 chains; thence south 89° 17′ E. 20 chains; thence S. 00° 30′ W. 20.43 chains; thence S. 77° 30′ W. 44.81 chains; thence north 2° 00′ E. 51.50 chains to place of beginning; also lots Nos. 3, 4, & 9 of section 16, T. 6 S., R. 3 W., according to the plats of the Government surveys, containing 225.28 acres, for the sum of $3,834 to them then and there paid by said Thompson; that at the time of said sale to said Thompson said land was well worth and should have, under ordinary circumstances, sold for the sum of $10,000.

2nd. To C. C. Kemly all that part of said lands described as follows, to wit: Lots Nos. 44, 45, 49, & 50, as per said Cross maps, and more particularly described as the east ½ of the S. W. ¼ and frac-

tional lot No. 2 of section 10 and the N. E. ¼ of the N. W. ¼ and fractional lot No. 2 of section 15, in T. 6 S., R. 3 west, of the Willamette meridian, according to the plats & the Government surveys, containing 160.02 acres, for the sum of $1,680.20 to them then and there paid by said Kemly therefor; that at said time said land so sold to said Kemly was well worth and would have, under ordinary circumstances, sold for $4,000.

3rd. To S. R. Scott lots Nos. 51 & 52, as known & designated on said Cross maps, said land so sold to said Scott being situated in T. 6 S., R. 3 west, of the Willamette meridian, Marion county, Oregon, and containing 80 acres; also lots Nos. 43, 46, 47, & 48, as shown by said Cross maps, containing 309.36 acres, in said T. 6 S., R. 3 W.,
77 Marion county, Oregon, for the sum of $2,089 to them in hand there paid by said Scott therefor; that at said time said lands were sold to said Scott they were well worth and would have, under ordinary circumstances, sold for $6,000; and these defendants saith that in making the said sales of said property as aforesaid the said Thomas Cross and the said Allen and Lewis expended large sums of money, to wit, the sum of $15,000, as fees to surveyors & commissioners and real estate agents, which sum the said Allen & Lewis wrongfully charged against the proceeds of said sales as realized by them; and these defts further saith that the sums of money for which said lands were sold as aforesaid nor any part of the same were never credited upon the said notes or mortgages; and these defts saith that said sales were so made without their acquiescence or consent, and that the whole sum received by said Allen & Lewis and said Thomas Cross on account of said sales was $8,594.20, and the aggregate value thereof at the dates of such sales was $20,000; and these defts, further answering, saith that the said lands of their said mother, Pluma F. Cross, ought to be excepted and released from the operation and effect of said mortgages and conveyances described in complainant's bill; that said lands of their said mother, Pluma Cross, *was* worth at the dates of said wrongful sales to said J. I. Thompson, C. C. Kemley, & S. R. Scott as aforesaid and *is* now worth the sum $10,000 and no more; and these defendants, further answering, saith they are informed and believe, and allege the fact to be, that the firm of Allen & Lewis, while they owned and controlled said notes and mortgages and after they were both due & payable, contracted at divers times, for good and sufficient considerations, with said Thomas Cross for extensions of the time of the payment of
78 said notes and mortgages for definite periods of time when each of said contracts were so made; but these defendants show to the court that they are unable to better plead said facts for the reasons that they received the information upon which said allegations are based from their father, Thomas Cross, who is now dead, and they know of no other person save the defendant, C. H. Lewis, who knows of said facts; and these defendants further show to the court that said Lewis, while a nominal defendant in this cause, is largely interested in the result of this suit adversely to these defts, and that he is unfriendly to these defts in the matter of said suit, and that the facts necessary to maintain said allegations can only be

obtained from said Lewis by process of subpœna and taking his testimony in this cause concerning said facts, by reason whereof these def'ts cannot more specifically plead the same; and these defendants further showeth to the court that they, with their codefendant, P. May Wilson, are the only children of said Pluma Cross; that Caroline Wright, Eliza O'Donald, W. T. Cross, and James Cross are the children of Thomas Cross, mentioned in complainant's bill, but by his former wife, M. G. Cross, who died in Milwaukee, Wisconsin, in or about the year 18—. These defendants, in addition to the foregoing answer, aver that the first cause of suit mentioned in said complaint of complainant, so far as the same relates to the lands of said Pluma Cross, deceased, is stale, the same not having been presented within ten years after her death, and the complainant & his assignors have been guilty of such gross laches in prosecuting said suit that he ought not in equity and good conscience be allowed to claim said demands as against said lands of said Pluma Cross, which *was* security for the debt of her husband, as hereinbefore stated; and these def'ts aver that said claim, so far as said Pluma Cross and these defendants are concerned, is barred
79 by the statute of limitations, which facts aforesaid these def'ts plead in bar of the complainant's said suit; and these def'ts pray that they may have the same benefit from the matters and things last aforesaid as if they had formally pleaded the same; and these def'ts, further answering, saith, as to the mortgage mentioned in complainant's second cause of suit, the same was likewise made by these def'ts' mother, Pluma Cross, as security only for the debt of her said husband, Thomas Cross, which fact the said Allen & Lewis at the time of the taking of said mortgage well knew; and these def'ts, in addition to the foregoing answer, aver that the second cause of suit mentioned in said complainant's bill is, if any such cause there may be, on or account or by reason of the several allegations and complaints in his said bill contained, did not accrue within ten years before said bill was filed, nor did the same accrue within ten years before the death of said Pluma F. Cross, and these allegations these defendants make in bar of the complainant's bill, so far as the lands of Pluma F. Cross therein described are concerned, and pray that they may be allowed and have the same benefit therefrom as if they had formally pleaded the same; and these def'ts saith that they are the owners in fee simple of an undivided two-thirds (or one-third each) interest in and to the said lands of said Pluma Cross, their mother, hereinbefore described; and these def'ts deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this, there is any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for these defendants to make answer thereto and not herein and hereby well and sufficiently answered, confessed, traversed, & avoided or denied is true to the knowledge or belief of these defendants,
80 and of which matters and things these def'ts are ready and willing to maintain and prove as this honorable court shall

direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

EDWIN C. CROSS.

N. B. KNIGHT AND W. H. HOLMES,
Att'ys for the Def'ts, E. C. Cross and Frank R. Cross.

UNITED STATES OF AMERICA, } ss:
District and State of Oregon, }

I, E. C. Cross, being first duly sworn, say, I am one of the defendants in the foregoing cause; that I know the contents of the foregoing answer, and that said answer is true, as I verily believe, so far as the same relates to me.

EDWIN C. CROSS.

Subscribed and sworn to before me this the 27th day of Dec., 1884.

W. W. THAYER,
Judge of Supreme Court.

UNITED STATES OF AMERICA, } ss:
District and State of Oregon, }

I, E. C. Cross, being duly sworn, say I am guardian *ad litem* of Frank R. Cross, one of the defendants in the foregoing suit; that I know the contents of the foregoing answer of said Frank R. Cross, and that the same is true, as I verily believe.

EDWIN C. CROSS.

Subscribed and sworn to before me by E. C. Cross, the guardian *ad litem* of the infant defendant, Frank R. Cross, assigned pursuant to an order dated the 13th day of December, 1884, this the 27th day of December, 1884.

W. W. THAYER,
Judge of Supreme Court.

(Endorsed:) Filed Mar. 10th, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

31 And afterwards, to wit, on the 10th day of March, 1885, there was duly filed in said court a demurrer and reply in words and figures as follows, to wit:

82 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William T. Cross and Christina Cross, His Wife; Caroline Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband, and Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

The demurrer of the complainant to part and his reply to the residue of the answer of the defendants, Edwin C. Cross and Frank Cross, by Edwin C. Cross, his guardian *ad litem*.

I. The complainant demurr*er* to so much of the said answer as is contained in lines 6, 7, 8, 9, 10, 11, 12, 13, 14, and 15 of the fifteenth page of the same, commencing with the words "That in said mortgage" and ending with the words "by the parties thereto."

And for cause of demurrer shows that the said defendants have not thereby made or stated such a case as constitutes in a court of equity a sufficient answer to his bill.

83 II. The complainant demurs to so much of the said answer as is contained in and between line 15 of the fifteenth page and line 24 of the eighteenth page of the same, commencing with the words "And these defendants" and ending with the words and figures "of such sales was $20,000;" and for cause of demurrer shows that the said defendants have not thereby made or stated such a case as constitutes in a court of equity a sufficient answer to his bill; and for special cause of demurrer in this behalf shows that it does not appear by the said answer that any higher price would have been obtained by the process of foreclosure for the tracts of land therein more particularly described or for any of them than was actually obtained for them.

III. The complainant demurs to so much of the said answer as is contained in lines 24, 25, 26, 27, and 28 of the eighteenth page and in lines 1, 2, 3, 4, 5, 6, and 7 of the nineteenth page of the same, commencing with the words "And these defendants" and ending with the words "and no more;" and for cause of demurrer shows that the said defendants have not thereby made or stated such a case as constitutes in a court of equity a sufficient answer to his bill.

IV. And as for the residue of the said answer—that is to say, excepting the portions thereof embraced within the foregoing demurrers, and excepting also so much thereof as admits the allegations of the bill—the complainant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that

he will aver and prove his said bill to be true, certain, and
84 sufficient in the law to be answered unto, and that the said answer of the said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter whatever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed and denied, is true; all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his bill he hath already prayed.

FECHHEIMER & ACH,
Counsel for Complainant.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, M. W. Fechheimer, do hereby certify that I am one of the counsel for the complainant named in the foregoing demurrer; that I have examined said demurrer, and, in my opinion, the same is well founded in point of law.

M. W. FECHHEIMER,
Counsel for Complainant.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, M. W. Fechheimer, being first duly sworn, on oath say that I am one of the solicitors and of counsel for the complainant named in the foregoing demurrer; that said complainant is not now within the district of Oregon, which is the reason why I make this verification; that the foregoing demurrer is not interposed for delay.

M. W. FECHHEIMER.

Subscribed and sworn to before me this 10th day of March, A. D. 1885.

[SEAL.] J. B. THOMPSON,
Notary Public for Oregon.

(Endorsed:) Filed March 10th, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

85 And afterwards, to wit, on the 20th day of March, 1885, there was duly filed in said court an account of receiver in words and figures as follows, to wit:

86 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JOHNATHAN O'DONALD, Her Husband; Caroline M. Wright and John G. Wright, Her Husband; Wm. T. Cross and Christina Cross, His Wife; P. May Wilson and John T. Wilson, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, and Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Deceased; Adelia Cross, Widow of Thomas Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

And now comes John C. Lewis, receiver in the above-entitled suit, and makes and files his first report of his doings as such receiver, that, deeming it to the best interest of all concerned to have a person residing close to the lands involved in this suit to attend to the renting and leasing of the same and the collecting of rents, he did immediately appoint John G. Wright, of Salem, Oregon, as such agent; that I have rented and leased the greater portion of the lands involved; that I have received therefrom up to this date in
87 money and in produce now reduced to money the sum of $2,379 90

That I have paid out for freights, weighing, storage, sacks, and sale commissioners on produce received as rents the sum of $340 17
For school taxes 36 44
Traveling expenses in going to & from Salem and to lands, 3 trips 60 00
To J. G. Wright for services, 4 months 100 00
For hauling sacks, labor on lands, and repairs and insurance 211 20
747 81

Balance in my hands $1,632 09

That I have relet different portions of the lands with the proviso that the lessees deliver the rental product to such warehouse as I might indicate, thus saving the expense of hauling by the receiver.

That by reason of the late storms a farm situate upon these lands became damaged, and in the opinion of your receiver it would be to the best interest of all herein interested that such repairs as are needed and convenient be made upon said farm; that the county and State taxes upon said lands will become delinquent on April 1st, 1885; that said taxes are about — dollars and should be paid.

Wherefore your receiver prays that an order be made approving this his account, and that he be by order of this court ordered and allowed to repair the said barn and to pay the taxes on said lands, and for such further order as may seem meet.

JOHN C. LEWIS, *Receiver.*

88 STATE OF OREGON, } ss:
Multnomah County, }

I, John C. Lewis, being first sworn, on oath say that I am the receiver above mentioned; that the foregoing account is true as I verily believe.

JOHN C. LEWIS.

Subscribed and sworn to before me this the 19th day of March, A. D. 1885.

J. B. THOMPSON,
[SEAL.] *Notary Public for Oregon.*

(Endorsed:) Filed Mar. 20, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

89 And afterwards, to wit, on the 20th day of March, 1885, there was duly filed in said court a motion for order confirming report in words and figures as follows, to wit:

90 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JOHNATHAN O'DONALD, Her Husband; Caroline M. Wright and John G. Wright, Her Husband; Wm. T. Cross and Christina Cross, His Wife; P. May Wilson and John T. Wilson, Her Husband; James Cross & Francis E. Cross, His Wife; Edwin C. Cross, and Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Deceased; Adelia Cross, Widow of Thomas Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

And now comes John C. Lewis, receiver in the above-entitled suit, by Messrs. Fechheimer & Ach, his attorneys, and, upon the report of his doings as receiver and the recommendation therein contained, moves for an order confirming said report and for an order authorizing and directing the necessary repairs to the barn in said report alluded to and authorizing said receiver to pay the taxes upon the lands in the said suit involved, both county & State.

FECHHEIMER & ACH,
Att'ys for Receiver.

(Endorsed:) Filed Mar. 20, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

91 And afterwards, to wit, on Friday, the 27th day of March, 1885, the same being the 86th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

92 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

MARCH 27, 1885.

This cause having heretofore been heard upon the demurrer of the plaintiff to part of the answer of Edwin C. Cross and Frank Cross herein and argued by Mr. M. W. Fechheimer, of counsel for plaintiff, and by Mr. William H. Holmes, of counsel for said defendants, and taken under advisement by the court, and now, at this day, the court being fully adyised in the premises, and it appearing to the court that a demurrer to an answer is an irregular method of procedure in equity causes, it is ordered that the said demurrer be, and the same is hereby, overruled; and upon motion of said plaintiff, by Mr. Henry Ach, of counsel, it is further ordered that the said plaintiff have two weeks herefrom to file exceptions to said answer.

DEADY, *J.*

(Endorsed:) Filed Mar. 27, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

93 And afterwards, to wit, on the 9th day of April, 1885, there was duly filed in said court exceptions to answer in words and figures as follows, to wit:

94 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; WILLIAM T. CROSS and CHRISTINA CROSS, His Wife; CAROLINE WRIGHT and JOHN G. WRIGHT, Her Husband; JAMES CROSS and FRANCIS E. CROSS, His Wife; EDWIN C. CROSS; P. MAY WILSON and JOHN T. WILSON, Her Husband, and FRANK CROSS, a Minor, Heirs-at-Law of THOMAS CROSS, Deceased, and PLUMA F. CROSS, Deceased; ADELIA CROSS, Widow of THOMAS CROSS, and JOHN G. WRIGHT and EDWIN C. CROSS, Administrators of the Estate of THOMAS CROSS, Deceased, and C. H. LEWIS, Defendants.

Exceptions taken to the answer of the defendants, Edwin C. Cross and Frank Cross, a minor, the latter by Edwin C. Cross, his guardian *ad litem*, on the ground of impertinence.

First. For that the whole of the paragraph of said answer commencing with the words "That in said mortgage," in line 6 of page fifteen thereof, and ending with the words "by the parties thereto," in the 15th line of the same page, is impertinent.

95 Second. For that the whole of the paragraph of said answer commencing with the words "And these defendants," in

line 15 of the fifteenth page thereof, and ending with the word and figures "was $20,000.00," in line 24, of page eighteen, is impertinent.

Third. For that the passage commencing with the words "And these def'ts," in line 24 of said eighteenth page, and ending with the words "and no more," in line 7 of the nineteenth page thereof, is impertinent.

In all which particulars this exceptant excepts to the said answer as impertinent, and humbly insists that the said matters are immaterial, irrelevant, and *is* impertinent and ought to be expunged therefrom.

FECHHEIMER & ACH,
Counsel for Complainant.

(Endorsed:) Filed April 9th, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

96 And afterwards, to wit, on the 25th day of April, 1885, there was duly filed in said court a stipulation in words and figures as follows, to wit:

97 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD, EDWIN C. CROSS, FRANK CROSS, by EDWIN C. CROSS, His Guardian *ad Litem, et al.*, Defendants.

It is hereby stipulated that the exceptions filed herein to the answer of the defendants, Edwin C. Cross and Frank Cross, may be submitted to the court for its decision upon the argument heretofore made and the authorities cited upon the argument of the complainant's demurrer to the said answer of said defendants.

Dated April 22nd, 1885.

FECHHEIMER & ACH,
Counsel for Complainant.
W. H. HOLMES,
Counsel for Defendants, Edwin C. & Frank Cross.

(Endorsed:) Filed Apr. 25, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

98 And afterwards, to wit, on Friday, the 8th day of May, 1885, the same being the 13th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

99 In the Circuit Court of the United States for the Ninth Judicial Circuit, District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

MAY 8, 1885.

This cause was heard upon the exceptions of the plaintiff to the answer of Edwin C. Cross and Frank Cross for impertinence, and argued by Mr. M. W. Fechheimer, of counsel for plaintiff, and by Mr. William H. Holmes, of counsel for said defendants.

On consideration whereof the court finds that the matters included in said exceptions are pertinent to the defense set up in said answer; therefore it is ordered that said exceptions be, and the same are hereby, overruled, and that the said plaintiff be allowed ten days herefrom in which to file amendments to his bill herein.

DEADY, *J.*

(Endorsed:) Filed May 11, 1885. R. H. Lamson, clerk, by G. G. Gammons, deputy.

100 And afterwards, to wit, on the 8th day of May, 1885, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

101 U. S. Circuit Court, District of Oregon.

FRIDAY, *May* 8, 1885.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

Suit to Enforce the Lien of a Mortgage.

(1.) Creditor and surety.—A creditor who has or acquires a lien on the property of his debtor as a security for his debt is a trustee of the same for the benefit of the surety, if there be one, and if by any willful act of his such lien is lost or destroyed, to the injury of the surety, the latter is so far discharged from liability for the debt.

(2.) *Idem*—Burden of proof.—When a creditor relinquishes a lien he may have on the property of his debtor in a suit to collect his debt from the surety the burden of proof is on him to show that the surety was not injured by such relinquishment.

(3.) Conclusions of law.—It is sometimes necessary and proper in equity pleadings to make deductions from the facts stated that are more or less conclusions of law.

DEADY, *J.*:

On November 1, 1871, Thomas Cross, of Salem, Oregon, gave his promissory note to the firm of Allen & Lewis, of Portland, Oregon,

for the sum of $30,000, payable in three years from date, with interest at 10 per centum per annum, payable semi-annually, and to secure the payment of the same he and his wife, Pluma F., on the same day executed and delivered to said firm a mortgage on fifteen parcels of land situate in Marion county and containing in the aggregate about 3,390 acres, and on January 23, 1872, said Thomas Cross gave his promissory note to said firm for the sum of $10,000, payable in one year from date, with interest at 1 per centum per month, and to secure the payment of the same he and said Pluma F. on the same day executed and delivered to said firm a second mortgage on the real property aforesaid, together with the south half of block 30, in Salem, and certain parts of lots 1, 2, and 3, in block 20, in said town.

On September 16, 1872, said Pluma F. died.

On January 22, 1876, said notes being still unpaid, said Thomas Cross and C. M. Cross, his then wife, executed and delivered to C. H. Lewis, a member of said firm, a conveyance, absolute on its face, of all said property subject to said mortgages, but upon the understanding and trust that said Lewis would farm and manage the same and apply the rents and profits thereof upon the debts secured thereon, and that he might, with the consent of said Thomas Cross, sell and dispose of the whole or any portion of the same and apply the proceeds in like manner.

On February 5, 1884, Thomas Cross died, soon after which the notes and mortgages aforesaid were indorsed and assigned by said firm to L. H. Allen, of San Francisco, a member thereof.

On August 6, 1884, said Allen brought suit in this court to enforce the lien of said mortgages, alleging that there was then due on the first of said notes, $15,137.04, with interest at 10 per centum per annum from December 22, 1881, and on the second $10,000, with interest from January 25, 1879, less $1,686.35 paid thereon.

Sundry persons, being the administrators and heirs of Thomas Cross and E. C. Cross, Frank R. Cross and P. May Wilson, the children and heirs of Pluma F. Cross, and C. H. Lewis, are made parties defendant to the bill.

On January 20, 1885, an order was made taking the bill for confessed as against all the defendants except E. C. Cross and Frank R. Cross, and on March 10, 1885, they answered the bill, the latter by the former as his guardian.

The answer admits the making of the notes and mortgages and the amounts due on them as alleged in the bill, except the amount due on the first note, which is stated at $15,137.04, with interest on $30,000 since December 22, 1881, instead of on the larger sum. It also admits the execution of the deed of January 22, 1876, to C. H. Lewis, but denies that it was made on any trust or understanding as alleged in the bill.

The answer then states that at and before the execution of the two mortgages and until her death Pluma F. Cross was the owner in fee simple of the two parcels of real property described therein as a portion of the donation of Daniel Leslie, containing 80 acres, and the donation of F. S. Hoyt and wife, containing 131 acres, and

otherwise designated in the bill as parcels 14 and 15; that prior to the execution of said mortgages Thomas Cross was indebted to the the firm of Allen & Lewis for money theretofore advanced to him in the sum of $30,000, which he was unable to pay, and to secure the payment of which said notes and mortgages were given; that, at the urgent solicitation of her husband and the attorney of said firm, she was induced to join in said mortgage and thus "interpose her said lands as security only for said debt of her said husband."

Then follow certain allegations which are excepted to by the plaintiff as impertinent. Briefly they are as follows:

(1). That it was stipulated in said mortgages that in default of payment of the notes that they should be foreclosed as provided by law, and no other or different mode of sale of said lands was provided therein or contemplated by the parties thereto.

(2). That after the death of said Pluma F. Cross, and in November, 1876, said Thomas Cross entered into an agreement with Allen & Lewis, in pursuance of which they sold and conveyed sundry portions of said mortgaged premises contrary to the terms and conditions of said mortgages, as follows: To J. I. Thompson 413.06 acres, for $3,834; to C. C. Kennedy 160.02 acres, for $1,680.20; to S. R. Scott 309.36 acres, for $3,080; in all, 882.44 acres, for $8,594.20, which land was then worth and would have sold under ordinary circumstances for $20,000; that in making said sales said parties expended $1,500 in surveys, commissions, and agents, and wrongfully charged the same to the proceeds of said sales; that no part of said proceeds were ever credited on said notes or mortgages, and that said sales were made without the consent of the defendants.

(3). That the said lands of Pluma F. Cross were at the time of said sales and now are worth not more than $10,000, and, the premises considered, the same ought to be released and discharged from the operation and effect of said mortgages.

It appearing from the allegations thus excepted to that the creditors, Allen & Lewis, voluntarily disposed of a portion of the debtor's property, on which they had a lien for their debt, at a loss or sacrifice of not less than $10,000—a sum equal to the value of the property which the defendant's mother mortgaged as a security for said debt—they claim that the same is discharged from the operation of the mortgage, and that therefore such allegations constitute, as to them, a good defense to the bill.

The argument in support of the exceptions is that, admitting the sale of a portion of the debtor's property at a loss, the conclusion that the property of the surety is therefore released from the effect of the mortgage does not follow, because all the property included in the mortgage is not sufficient to satisfy the debt by more than $10,000, and therefore it can make no difference to these defendants whether such sum was lost by this disposition of the debtor's property or not. They are not injured in any view of the case, because, after making due allowance for this loss, their property will still be required to satisfy the debt.

It is admitted that Mrs. Cross was only a surety in this transaction for the debt of her husband, and it is not disputed that if the cred-

itors relinquished their lien on any portion of the debtor's property included in the mortgage without reducing the debt in an amount equal to the value thereof that the property of the surety is so far a discharge from the lien thereof.

This rule is the result of equitable principles inherent in the relation of principal and surety, which require that the property of the former pledged to the creditor for the payment of his debt shall, for the benefit of the latter, be applied to that purpose. A creditor with such a lien is so far a trustee for all parties concerned, and must not deprive any one of the benefit of it. Upon paying the debt the surety is subrogated to the right of the creditor in this respect, but if in the meantime the latter has done anything to impair the value of such right, the former is so far discharged from his liability. Brandt on Suretyship, § 370; Neff's Appeal, 9 W. & S., 43; American Bank *v.* Baker, 4 Met., 177; Cummings *v.* Little, 45 Maine, 187; Hayes *v.* Ward, 4 John Ch., 129; Baker *v.* Briggs, 8 Met., 129.

In Hayes *v.* Ward, *supra*, Chancellor Kent says: "The surety, by his very character and relation as surety, has an interest that the mortgage taken from the principal debtor should be dealt with in good faith and held in trust, not only for the creditor's security, but for the surety's indemnity. A mortgage so taken by the creditor is taken and held in trust, as well for the secondary interest of the surety as for the more direct and immediate benefit of the creditor; and the latter must do no willful act, either to poison it, in the first instance, or to destroy or cancel it afterwards."

But it is not stated either in the bill or answer what is the value of the portion of the debtor's property still covered by the mortgage, and therefore it does not appear whether or not the whole of it was sufficient, if disposed of at a fair value, to satisfy this debt without recourse upon the surety property.

In round numbers, there is now due on these notes not less than $80,000. In the argument for the exceptions it is claimed that the whole property included in the mortgage is not sufficient to pay the debt by a much larger sum than the alleged value of the defendants' property; and if this is so, then the defendants are not injured by what they complain of, and the allegations excepted would be no defense to the bill, and be clearly impertinent. But the court cannot say judicially what this 3,390 acres of land is worth. It
102 cannot assume that it is only worth $70,000 and not $80,000, though it may not fetch either sum when put up at auction. The rule seems to be that the burden of proof is on the creditor in a case of this kind to show that the surety has not been injured by the transaction. Brandt on Suretyship, § 370.

It follows that the allegations excepted to are not impertinent, but constitute a good defence to the relief prayed for as to these defendants. The plaintiff must either deny them by a replication or confess and avoid them by proper amendments to this bill.

The further point made in support of the third exception, that the matter excepted to is a mere conclusion of law, is not well taken. It is sometimes proper and convenient in equity pleading, as a means of indicating the relief to which the party considers himself entitled

or the defence sought to be made, to make deductions from the facts stated that are more or less conclusions of law; and this seems to be the character of this allegation.

The exceptions are disallowed.

Mr. M. W. Fechheimer, for the plaintiff.
Mr. William H. Holmes, for the defendants.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed May 8, 1885. R. H. Lamson, clerk.

103 And afterwards, to wit, on Wednesday, the 20th day of May, 1885, the same being the 17th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

104 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

MAY 20, 1885.

At this day, on motion of Mr. Henry Ach, of counsel for plaintiff herein, it is ordered that said plaintiff have till Monday, June 1, 1885, to file an amended bill of complaint herein.

DEADY, *J.*

(Endorsed:) Filed May 20th, 1885. R. H. Lamson, clerk.

105 And afterwards, to wit, on the 25th day of May, 1885, there was duly filed in said court a petition for order that receiver sell property in words and figures as follows, to wit:

106 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

To the honorable the judges of the circuit court of the United States for the district of Oregon:

The petition of L. H. Allen, the complainant herein, respectfully shows unto your honors—

That a decree *pro confesso* herein was entered against all the defendants except the defendants Edwin C. Cross and Frank Cross, a minor, the latter sued herein by Edwin C. Cross, his guardian
107 *ad litem*, on the — day of ——, A. D. 1885.

That said defendants, Edwin C. Cross and Frank Cross, have filed an answer to the bill of complaint herein, wherein they seek to have certain portions of said mortgaged premises known in said bill of complaint as "fourteenth" and "fifteenth" released and freed from the operation and effect of the complainant's mortgages; that it is admitted in said answer that there is now due and owing upon said notes and mortgages about the sum of eighty thousand ($80,000.00) dollars; that no controversy exists in this cause as to the right of complainant to have all the remainder of said mortgaged premises sold in satisfaction of complainant's demands herein.

That the whole amount of money which would be realized from a sale of all the property described in the complaint herein upon foreclosure would be insufficient by more than twelve thousand dollars to satisfy the amount due to complainant herein upon said notes and mortgages.

That the entire income derived from said property at the present time is not sufficient, after paying the expenses of the receiver herein and the costs of caring for and managing said estate, to pay the interest accruing upon said promissory notes.

That during the year 1876 and prior to the 14th day of October, 1876, the defendant, C. H. Lewis, by and with the approval and cooperation of the said Thomas Cross, deceased, had all the lands covered by said mortgages lying in township six south, range three west, surveyed and divided into tracts or lots of about forty acres each, such lands being the same lands included in those described as being tracts numbered one to eleven, inclusive, in the bill of complaint herein, and containing 2,326.37 acres of land, more or
107½ less, and that at the same time said C. H. Lewis, acting in conjunction with said Thomas Cross, deceased, caused and procured a map or plat of such lands so surveyed and divided to be made; that upon such plat said lands are divided into fifty-five different tracts, numbered thereon from one to fifty-five, inclusive, and that on the 4th day of November, 1876, said map or plat was by said Thomas Cross, deceased, recorded in the office of the county recorder of Marion county aforesaid.

That in any sale that should take place of said lands in said township six it would be greatly to the advantage of said estate that such lands should be sold according to the division thereof upon said map or plat rather than according to the Government survey, for the reason that upon the former such lands are divided into convenient tracts according to the nature and value of the land.

That between the 14th day of October, 1876, and the 15th day of November, 1876, the defendant, C. H. Lewis, in pursuance of the trust and agreement and understanding entered into between said Lewis and said Thomas Cross, deceased, on or about the 22nd day of January, 1876, as alleged in said bill of complaint, did sell to various parties at public and private sale about 952.51 acres of land in said

township six, the lands so sold being known and designated upon said map or plat as lots numbered 38, 39, 40, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, and 55, and that the proceeds of such sales were applied toward the satisfaction of said notes and mortgages held by complainant.

That it would be expedient and for the best interest of the said estate that all the lands mentioned and described in the bill of complaint herein, except that known and described as tracts
108 "fourteenth" and "fifteenth," in regard to which a controversy exists, and except the lands sold by said C. H. Lewis, as hereinbefore stated, should be sold by John C. Lewis, the receiver herein, as upon execution before final decree in this cause and the proceeds of such sales be applied, so far as may be, toward the payment of the amount due this complainant after deducting the necessary costs and charges thereof and the costs and expenses of this suit.

That the defendants, Edwin C. Cross and Frank Cross, the latter by his guardian *ad litem*, consent that such property be so sold and the proceeds of such sale be so applied, which consent is hereunto presented and filed herein.

Wherefore your petitioner prays your honors to make an order herein directing and authorizing said receiver, John C. Lewis, to sell as upon execution all the lands described in the bill herein except tracts "fourteenth" and "fifteenth" and except that already sold by said C. H. Lewis, and that the lands in township six be sold and deeds be made according to said Cross map or plat, and that the proceeds of such sale be applied as this court shall direct, and that such land be sold free from all liens or claims of any of the defendants herein.

And your petitioner will ever pray, &c.

FECHHEIMER & ACH,
Counsel for Petitioner and Complainant.

UNITED STATES OF AMERICA, }
District of Oregon, } *ss:*

I, Henry Ach, being first duly sworn, on oath say that I am one of the counsel for complainant and the petitioner above named; that said complainant and petitioner is not now within the district of Oregon, which is the reason why I make this verification; that the foregoing petition is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this 25th day of May, A. D. 1885.

J. B. THOMPSON,
[SEAL.] *Notary Public for Oregon.*

(Endorsed:) Filed May 25, 1885. R. H. Lamson, clerk.

109 And afterwards, to wit, on the 25th day of May, 1885, there was duly filed in said court a stipulation in words and figures as follows, to wit:

110 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

It is stipulated and agreed by the parties hereto signed that an order be made herein authorizing and directing the receiver in this suit to sell as upon execution all the lands — the complaint described except those already sold and the lands known as the land of Pluma F. Cross, described as follows:

As a part of the donation land claim of David Leslie & wife, situated in T. 7 S., R. 3 west, of the Willamette meridian, and known as claim 45, being bounded and described as commencing at a point in the south boundary line of said claim 6.25 chains S. 89° 30′ W. from the S. E. corner of said claim, thence north 1° 00′ east parallel to the east line of said claim 8.05 chains; thence east 10.83 chains (the last 4.58 chains of this last line being along the
111 south line of the land of said claim); thence W. 0° 30′ E. 17.06 chains; thence west 35.07 chains; south 2° 30′ west 25.30 chains to the south line of said claim; thence N. 89° 30′ east along the south line of the claim 25.27 chains to the place of beginning, containing 80 acres, more or less, in Marion county, Oregon; also the donation land claim of F. S. Hoyt and wife, the same being known as claim No. 53, notification 69, in T. 7 S., R. 3 west, containing 131 acres of land, more or less, in Marion county, Oregon, said two parcels being designated as Nos. 14 and 15 in the bill of complaint herein.

The said lands to be sold as described in Thomas Cross' plat of said lands as by him recorded at the office of the county clerk of Marion county, Oregon.

FECHHEIMER & ACH.
Att'ys for Complainant.

The foregoing stipulation agreed to by E. C. Cross and Frank Cross, by E. C. Cross, his guardian *ad litem*, and the pl'ff may, if he chooses, sell, in accordance with said stipulation, the undivided one-third of the said lands above referred to as lots 14 and 15 so far as the def'ts signing are concerned.

W. H. HOLMES,
Att'y for E. C. Cross and Frank Cross,
Def'ts Above Named.

(Endorsed:) Filed May 25th, 1885. R. H. Lamson, clerk.

112 And afterwards, to wit, on Monday, the 25th day of May, 1885, the same being the 19th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

113 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline N. Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross; P. May Wilson and John Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

No. 1056. May 25, 1885.

Now, at this day, this cause comes on to be heard on the motion of the plaintiff for an order directing the receiver herein to sell certain portions of the real property in the bill mentioned and apply the proceeds thereof upon the debt due the plaintiff, and was argued by Mr. M. W. Fechheimer, of counsel for the plaintiff; on consideration whereof, it appearing to the court that the bill herein was, on January 21, 1885, duly taken as confessed against all the defendants herein except Edwin C. Cross and Frank Cross, and that said Edwin C. Cross and Frank Cross have, by their stipulation heretofore filed by their counsel, Mr. William H. Holmes, consented that said order may be made, therefore it is ordered and adjudged that the said John G. Lewis, the receiver herein, do sell as upon execution,

114 at such time or times as said receiver shall deem for the best interest of the parties hereto, the lands known and designated upon a map or plat recorded in the office of the county clerk of Marion county, Oregon, on November 4, 1876, by Thomas Cross, deceased, as lots numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, thirty-seven, and forty-one, containing one thousand three hundred and seventy-three acres and eighty-six one-hundredths of an acre, more or less, and being situate in township

six south of range three west of the Willamette meridian, in Marion county, Oregon, and being a portion of the same lands described in paragraphs or parcels one to eleven in the complaint herein, and that such lands be sold and deeds thereof be made according to the above plat or map instead of according to the Government survey thereof; and also the following-described lands:

The donation land claim of John Baum and Phebe D. Baum, his wife, certificate number two thousand seven hundred and fifty-seven, notification number six hundred and thirty-two, described as follows: The west half and northwest quarter of northeast quarter and lots numbered one, two, three, four, and five of section seven, and lots numbered one, two, three, four, five, and six of section eight, all in township eight south, range two west, containing six hun-
115 dred —, more or less.

Also the north half of the donation land claim of William N. Rector and Ann Rector, his wife, said claim being designated at the land office as donation claim number forty-five, and embracing part of sections seven, eight, seventeen, and eighteen, in township eight south, range two west, the said north half of said claim containing three hundred and twenty acres, more or less, being the lands described in paragraphs twelve and thirteen in said bill of complaint.

And also the south half of block thirty, in the city of Salem, Marion county, Oregon; also parts of lots one and two in block twenty, in said city of Salem, and described as commencing at a point on the north line of lot numbered one aforesaid sixty feet east of the northwest corner of said lot one, thence south at right angles to the south line of lot numbered two aforesaid; thence east twenty-two feet six inches; thence north at right angles to the north line of said lot one; thence west twenty-two feet six inches to the place of beginning; also lot numbered three, in said block numbered twenty, save and except the following-described part of said lot numbered three: Commencing at the northwest corner of said lot numbered three, thence south along the west line of said lot numbered three twenty feet; thence east sixty feet parallel with the north line of said lot number three; thence north at right angles twenty feet; thence west sixty feet to the place of beginning.

And it is further ordered and adjudged that said receiver pay the proceeds of such sales, after deducting the necessary costs
116 and charges thereof, to the complainant herein, to be applied upon the promissory notes of said Thomas Cross mentioned in the bill of complaint.

(Signed) DEADY, *J.*

Endorsed: Filed May 25, 1885. R. H. Lamson, clerk.

117 And afterwards, to wit, on the 1st day of June, 1885, there was duly filed in said court amendments to bill in words and figures as follows, to wit:

118 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD, JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Sued Herein by His Guardian *ad Litem*, Edwin C. Cross, Heirs of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

To the judges of the circuit court of the United States for the district of Oregon:

The complainant, by leave of the court, presents and files these his amendments to his bill of complaint filed herein, to be inserted as follows:

After the words "at private," in line seven of page twenty thereof, insert the words "or public."

119 On the same page, after the word "aforesaid," in line eleven, insert the following:

And complainant further alleges that during the year 1876 and prior to the 14th day of October, 1876, the said defendant, C. H. Lewis, caused the lands above described as situated in sections three, nine, ten, fifteen, sixteen, twenty-one, twenty-two, twenty-seven, and twenty-eight, in township six south, of range three west, Willamette meridian, containing in all 2,326.37 acres, more or less, to be surveyed and divided into parcels, numbered from one to fifty-five, inclusive, each parcel containing about forty acres of land; and at the same time caused and procured an appraisement and valuation of such lands so surveyed to be made by the said Thomas Cross, deceased, and by other disinterested persons familiar with the character and value of said lands, and also caused and procured a plat or map of such survey to be made, and which map or plat was recorded in the office of the county clerk of Marion county aforesaid by said Thomas Cross, deceased, on the 14th day of November, 1876, where the same now remains on record.

That on the 14th day of October, A. D. 1876, and subsequent thereto and prior to November 15, 1876, the defendant, C. H. Lewis, under and by virtue of such understanding and agreement with Thomas Cross, deceased, sold and disposed of certain portions of said mortgaged premises, to wit:

First. To one J. I. Thompson the land known and described upon the survey and plat of said lands as lots numbered 53, 54, and 55 and upon the Government survey as lots 1, 2, and 3, in section 4, in said township 6 south, range 3 west, containing 187.65 acres, for the sum of $397.98, which had been appraised at $750.00; also the lands

known and described upon the hereinbefore-mentioned survey and plat of said lands as lots 38, 39, 40, and 42, and known
120 upon the Government survey thereof and bounded as follows: Commencing 26.44 chains south and 25.50 chains west of the northeast corner of section 16, in t'p 6 south, range 3 west, and running thence south 89° 17′ east 21.81 chains; thence south 00° 30′ west 20 chains; thence south 89° 17′ east 20 chains; thence south 00° 30′ west 20.43 chains; thence south 77° 31′ west 44.81 chains; thence north 2° east 51.50 chains to place of beginning; also lots 3, 4, and 9, all in section 16, township 6 south, range 3 west, containing 225.48 acres, for the sum of $3,435.52, which had been appraised at $3,466.50, the deed to said lands sold to said Thompson being dated the 15th day of November, 1876, and recorded in Book 21 of Deeds, at page 256, records of Marion county aforesaid.

Second. To one C. C. Keney lands known upon said survey and plat as lots 44, 45, 49, and 50, and known upon the Government survey as the east ½ of the southwest ¼ and fractional lot number 2, all in section 10, and the northeast ¼ of the northwest ¼ and fractional lot No. 2 of section 15, all in said township 6 south, range 3 west, of the Willamette meridian, containing 160.02 acres, for the sum of $1,680.21, which lands were appraised at $1,733.75, and the deed whereof is dated the 15th day of November, A. D. 1876, and recorded in Book 21 of Deeds, at page 256, records of said county of Marion.

Third. To one S. R. Scott the lands known upon said survey and plat as Nos. 51 and 52 and upon the Government survey as a portion of section 10, in township 6 south, range 3 west aforesaid, containing 80 acres, for the sum of $480.00, which had been appraised at $560.00, and the deed whereof is dated the 15th day of November, 1876; also lands known *as* upon said survey and plat as lot 43 and being in section 15, lots 46 and 48 in section 10, and lot
121 47 in section 9, township 6 south, range 3 west aforesaid, containing 209.36 acres, for the sum of $2,600.00, which had been appraised at $1,913.10, the deed whereof is the same deed last above mentioned.

That of the lands so as aforesaid sold by said C. H. Lewis, lots 38, 39, 40, 42, 43, 46, 47, and 48 thereof, as designated upon said plat and survey, were sold subsequent to said 14th day of October, 1876, at private sale, and that the remainder of such lands so as aforesaid sold by said C. H. Lewis were sold at public auction at the State fair grounds at Salem, Oregon, on said 14th day of October, A. D. 1876; that such sales were long prior thereto extensively advertised throughout the State of Oregon in the following newspapers, to wit, the "Daily Oregonian" and the "Daily Evening Standard," printed and published at Portland, Oregon; in the "Willamette Farmer," the "Salem Statesman" and "Mercury," and in the "State Fair Gazette," printed and published at Salem, Oregon; and by hand-bills and posters distributed throughout the counties of Marion and Polk, State of Oregon.

That such sales were openly and fairly conducted, and the prices

obtained for the lands so as aforesaid sold thereat were the fair and reasonable value of such land and the best prices obtainable therefor.

That the costs and expenses of such sale, cost of advertising, surveying, appraising, platting, and mapping such lands amounted to the sum of $809.85; that prior to the execution and delivery of said notes and mortgages, as hereinbefore stated, to wit, on the 15th day of June, 1867, the said Thomas Cross and Pluma F. Cross, his wife, both deceased, made, executed, signed, sealed, duly stamped,
122 acknowledged, and delivered to the board of commissioners for the sale of school lands and the management of the common-school fund for the State of Oregon a mortgage upon a certain portion of the premises covered by the mortgage to this complainant, to wit, the northeast quarter of section twenty-two, the north half of the southeast quarter of section twenty-two, the southwest quarter of the southeast quarter of section twenty-two, the southeast quarter of the southwest quarter of section twenty-two of township six (6) south, of range three (3) west, in Marion county aforesaid, containing three hundred and twenty acres, more or less; which mortgage was given to secure the payment of a certain promissory note executed by said Thomas Cross to the mortgagee named in said mortgage, of even date with said mortgage, for the sum of $594.00, principal, payable one year from the date thereof, with interest from date thereof at ten per cent. per annum, principal and interest payable only in U. S. gold coin, which mortgage was on the 18th day of June, 1867, recorded in volume No. 4, at page 500, records of mortgages of said Marion county; that on the 22nd day of March, 1876, the said note and mortgage were long past due and unpaid, and the lien of said mortgage still existed and was a prior lien to that of the mortgage held by complainant upon the lands described therein; and that on said date last named there was due upon said note and mortgage the sum of $725.50, principal and interest; and that on the said last-named date the defendant, C. H. Lewis, at the request of said Thomas Cross and in order to prevent a foreclosure of said mortgage and a sale of the premises covered thereby, did pay said sum of $725.50 so due upon said mortgage to the mortgagers named therein and caused and procured the said mortgage to be satisfied upon record.

123 That at the date of the execution and delivery of the notes and mortgages first in this bill mentioned the said Thomas Cross, deceased, was not the legal owner of certain portions of said mortgaged premises, to wit, lots 3, 4, and 5 and the southwest ¼ of the southwest ¼ of section 22 and lot 6 of section 21, all in said township 6 south of range 3 west, in Marion county, Oregon, containing 110.87 acres; but that he then held a bond for a deed thereof from the board of commissioners for the sale of school lands of the State of Oregon; and that on the 22nd day of March, 1876, there was due upon said bond from said Thomas Cross to said board of commissioners the full sum of $221.74, which sum was required to be paid in order to entitle said Thomas Cross to a deed of said land, and that on said 22nd day of March, 1876, the defendant, C. H. Lewis, at the request of said Thomas Cross, deceased, and in

order to prevent and avoid a forfeiture to the estate of said lands and to perfect the title thereto, did pay to said board of commissioners said sum of $221.74, and did thereupon receive from the State of Oregon a deed to said lands, which deed is dated the 27th day of March, 1876, and is recorded in Book 18 of Deeds, at page 671, records of Marion county, Oregon.

And your orator further says that all the moneys realized from such sales of said lands, after deducting the expenses, costs, and charges thereof and the costs of platting, survey, and appraisement thereof, as hereinbefore stated, and after deducting said sums so as aforesaid paid in satisfaction of said mortgage and bond hereinbefore mentioned to said board of commissioners, were applied towards the satisfaction and payment of the notes and mortgages held by your orator; and that on the 22nd day of November, 1878, your orator and the defendant, C. H. Lewis, made, executed, sealed,
124 acknowledged, and delivered to said Thomas Cross, deceased, a release from the operation and lien of said mortgage of all the lands so as aforesaid sold except the lands known upon the said plat and survey as lots 43, 46, 47, and 48, which release is recorded in Book 10 of Mortgages, at page 235, records of said Marion county.

In line 26 of the same page of said bill, after the word "demands" add the words "by more than twelve thousand dollars, and that the amount which would be realized upon a sale of the whole of the property now covered by said mortgages will not exceed the sum of sixty-five thousand dollars."

FECHHEIMER & ACH,
Counsel for Complainant.

UNITED STATES OF AMERICA, *District of Oregon*, } *ss:*

I, Henry Ach, being first duly sworn, on oath say that I am one of the counsel for the complainant herein; that said complainant is not now within the district of Oregon, which is the reason why I make this verification; that I have read the foregoing amendments and know the contents thereof, and that the same are true as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this 22nd day of May, A. D. 1885.

[SEAL.] J. B. THOMPSON,
Notary Public for Oregon.

(Endorsed:) Filed June 1, 1885. R. H. Lamson, clerk.

125 And afterwards, to wit, on the 15th day of September, 1885, there was duly filed in said court a stipulation as to answer in words and figures as follows, to wit:

126 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

In the above-entitled cause it is hereby stipulated by and between the complainant and the defendants, Edwin C. Cross and Frank Cross, the latter sued herein and acting by and through Edwin C. Cross, his guardian *ad litem*, acting by and through their respective counsel, that all the allegations of the amendments to the bill of complainant filed herein, not denied in the answer of the de-
127 fendants, Edwin C. Cross and Frank Cross, heretofore filed herein, except only the allegation as to the value of the lands sold at auction, as alleged in said amendments to said bill of complaint, shall be considered and taken as admitted, and that no proof shall be required in relation thereto.

And it is further stipulated that the answer heretofore filed herein by said Edwin C. and Frank Cross shall stand as an answer to the said original bill of complaint and said amendments thereto, and that no amended or additional answer shall be filed by said defendants, Edwin C. and Frank Cross.

Dated at Portland, Oregon, Sept. 15, 1885.

FECHHEIMER & ACH,
Solicitors for Complainant.
W. H. HOLMES,
Solicitor for Defendants, Edwin C. and Frank Cross.

(Endorsed:) Filed Sept. 15, 1885. R. H. Lamson, clerk.

128 And afterwards, to wit, on the 10th day of October, 1885, there was duly filed in said court a receiver's report of sale and distribution in words and figures as follows, to wit:

129 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD, JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Piuma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants. } No. 1150.

Receiver's Report of Sale and Distribution of Proceeds.

To the honorable judges of the circuit court of the United States for the district of Oregon:

In pursuance of a decree and order entered in the above-entitled cause on the twenty-fifth day of May, A. D. 1885, I, the undersigned receiver, appointed in this cause, respectfully report that I duly advertised, according to law and the decree, the premises in said decree and hereinafter described to be sold at public auction to the highest bidder, for cash, subject to redemption, at the hour eleven o'clock in the forenoon on Thursday, the seventeenth day of
130 September, A. D. 1885, at the court-house door of the court-house of Marion county, at Salem, in the county of Marion and State of Oregon, by causing a notice, containing the title of said cause, the names of the parties thereto, the name of the court in which it was pending, and a description of the premises to be sold and a statement of the aforesaid time, place, and terms of said sale, to be published for four successive weeks immediately prior to said day of sale, to wit, four times, in the "Oregon Statesman," a weekly newspaper of general circulation in said county, printed and published every Friday in Salem, in said county. The date of the first paper containing such notice was the fourteenth day of August, A. D. 1885, and the date of the last paper containing the same was the eleventh day of September, A. D. 1885, and also by posting, four weeks prior to said day of sale, printed copies of said notice in three of the most conspicuous places in said county, a printed copy of which said notice so published and posted is hereto attached, marked Exhibit "A," and made a part of this report.

That at the time and place so designated for said sale I attended to make the same and offered and exposed said premises for sale at public auction to the highest bidder, subject to redemption.

131 That I first offered for sale the following portions of land situate, lying, and being in said county of Marion, State of Oregon, to wit: The lands known and designated upon a map or

plat filed and recorded in the office of the county clerk of Marion county, State of Oregon, on November 4, 1876, by Thomas Cross, deceased, as lots numbered one (1), two (2), three (3), four (4), and five (5), containing two hundred and thirty and $\frac{48}{100}$ (230.48) acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of three thousand four hundred and fifty-seven dollars and twenty cents ($3,457.20), or at the rate of fifteen dollars per acre, and that being the highest bid offered therefor I accordingly struck off and sold to said bidder, subject to redemption, the above-described premises.

And that I then offered for sale the following portions of land situate, lying, and being in the county and State aforesaid, to wit: The lands known and designated upon the map or plat aforesaid as lots numbered six (6), seven (7), eight (8), and nine (9), containing one hundred and sixty (160) acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of twelve hundred ($1,200.00) dollars, or at the rate of seven dollars and fifty cents per acre, and that being the highest bid offered therefor I accordingly struck off and sold to said bidder, subject to redemption, the above-described premises.

And that I then offered for sale the following portions of land situate, lying, and being in the county and State aforesaid, to wit: The lands known and designated upon the aforesaid map or plat as lots numbered twelve (12), thirteen (13), and twenty-five (25),
132 containing one hundred and forty-six & $\frac{22}{100}$ acres (146.22) in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of eleven hundred and sixty-nine dollars and seventy-six cents ($1,169.76), or at the rate of eight ($8.00) dollars per acre, and that being the highest bid offered therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

And that I then offered for sale the following portions of land situate, lying, and being in the county and State aforesaid, to wit: The lands known and designated upon the map or plat aforesaid as lots numbered eleven (11), fourteen (14), and twenty-four (24), containing one hundred and twenty (120) acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of sixteen hundred and eighty (1,680.00) dollars, or at the rate of fourteen dollars per acre, and that being the highest bid offered therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

And that I then offered for sale the following portions of land situate, lying, and being in the county and State aforesaid, to wit: The lands known and designated upon the aforesaid map or plat as lots numbered ten (10), fifteen (15), and twenty-three (23), containing one hundred and twenty acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of seven hundred and twenty (720.00) dollars, or at the rate of six dollars per acre, and that being the highest bid offered therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

And that I then offered for sale the following portions of land

situate, lying, and being in said county and State, to wit: The lands known and designated upon the map or plat aforesaid
133 as lots numbered sixteen (16), seventeen (17), twenty-one (21), and twenty-two (22), containing one hundred and sixty acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of nine hundred and sixty (960.00) dollars, or at the rate of six dollars per acre, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

And that I then offered for sale the following lands situate, lying, and being in said county and State, to wit: The land known and designated upon the aforesaid map or plat as lots numbered eighteen (18), nineteen (19), and twenty (20), containing one hundred and twenty (120) acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of fourteen hundred and forty ($1,440.00), or at the rate of twelve dollars per acre, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, said last above described premises.

And that I then offered for sale the following lands situate, lying, and being in said county and State, described as follows, to wit: The land known and designated upon the aforesaid map or plat as lots numbered twenty-nine (29), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), and thirty-four (34), containing two hundred and forty (240) acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of twelve hundred ($1,200.00) dollars, or at the rate of five dollars per acre, and that being the highest sum bid therefore I accordingly struck off and sold to said bidder, subject to redemption, said last above described premises.

And that I then offered for sale the following lands situate,
134 lying, and being in said county and State, described as follows: The lands known and designated upon the aforesaid map or plat as lots numbered twenty-six (26), twenty-seven (27), twenty-eight (28), thirty-five (35), thirty-six (36), & thirty-seven (37), containing two hundred and sixty-seven and $\frac{32}{100}$ (267.32) acres in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of two thousand four hundred and five and $\frac{88}{100}$ (2,405.88) dollars, or at the rate of nine ($9.00) — per acre, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, said last above described premises.

And that I then offered for sale the following lands situate, lying, and being in said county and State, to wit: The donation land claim of John Baum and Theba D. Baum, his wife, certificate No. 2757, notification No. 632, described as follows: The west half and northwest quarter of the northwest quarter, and lots numbered one, two, three, four and five of section seven, and lots numbered one, two, three, four, five, and six of section eight, all in township eight south, range two west, containing six hundred & fifteen $\frac{6}{100}$ (615.06) acres, more or less, in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of twelve thousand three hundred and one & $\frac{20}{100}$ ($12,301.20) dollars, or at the rate of twenty ($20.00) dollars per acre, and that being the highest sum bid therefor I accordingly

struck off and sold to said bidder, subject to redemption, said last above described premises.

That I then offered for sale the following lands situate in said county and State, described as the north half of the donation land claim of William N. Rector and Ann Rector, his wife, said claim being designated at the land office as donation claim No. 45,
135 and embracing part of sections seven, eight, seventeen, and eighteen, in township eight south, range two west, the said north half of said claim containing three hundred and twenty acres, more or less, in one parcel; whereupon C. H. Lewis offered and bid therefor the sum of twelve thousand eight hundred ($12,800.00) dollars, or at the rate of forty ($40.00) dollars per acre, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

That I then offered for sale the south half of block number thirty (30), in the city of Salem, in said county and State, in one parcel; whereupon John Q. Wilson offered and bid therefor the sum of three thousand nine hundred and fifty ($3,950.00) dollars, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

That I then offered for sale the following lands, to wit: Parts of lots one (1) and two (2), in block twenty, in the city of Salem aforesaid, and described as commencing at a point on the north line of lot one aforesaid sixty feet east of the northwest corner of said lot one, thence south at right angles to the south line of lot number two aforesaid; thence east twenty-two feet six inches; thence north at right angles to the north line of said lot one; thence west twenty-two feet six inches to the place of beginning, in one parcel; whereupon John Hughes offered and bid therefor the sum of six hundred and fifty ($650.00) dollars, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

And that I then offered for sale the following-described
136 property, to wit: Lot number three (3), in block number twenty (20), in said city of Salem, save and except the following-described part of said lot number three, to wit: Commencing at the northwest corner of said lot No. 3, thence south along the west line of said lot No. 3 twenty feet; thence east sixty (60) feet, parallel with the north line of said lot No. 3; thence north at right angles twenty (20) feet; thence west sixty (60) feet to the place of beginning, in one parcel; whereupon John Hughes offered and bid therefor the sum of eight hundred and twenty-five ($825.00) dollars, and that being the highest sum bid therefor I accordingly struck off and sold to said bidder, subject to redemption, the premises last above described.

And I further report that I deemed it for the best interest of all parties concerned that an auctioneer should be employed to conduct said sale under my supervision and instruction, and that I therefore employed A. B. Richardson as such auctioneer, who at-

tended said sale and performed the duties of auctioneer thereat; that for his services as such auctioneer I engaged to pay him and have paid him the sum of fifty dollars, as per the annexed receipt, marked "Exhibit B."

The amount realized from the sale of said lands was in the aggregate the sum of forty-four thousand seven hundred and sixty-nine & $\frac{4}{100}$ (44,769.04) dollars.

In conclusion, I report that the moneys arising from said sale were insufficient to pay the amount found due.

137 SCHEDULE.

Received as the proceeds of said sale		$44,769 04
Paid out the following sums:		
Advertising	$38 25	
Auctioneer	50 00	
	88 25	

All of which is respectfully submitted.
Dated 10th day of October, A. D. 1885.

JOHN C. LEWIS, *Receiver.*

EXHIBIT "A."

Receiver's Sale.

In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JOHNATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants. } Suit in Equity.

138 Notice is hereby given that under and by virtue of an order of the circuit court of the United States for the district of Oregon, duly made and entered in the above-entitled cause on the 25th day of May, A. D. 1885, and to me directed, I, the undersigned, the duly appointed, qualified, and acting receiver in said

cause, will sell at public auction, to the highest and best bidder, for cash, at the court-house door, at Salem, Marion county, State of Oregon, on Thursday, the 17th day of September, A. D. 1885, between the hours of nine o'clock a. m. and four o'clock p. m., to wit, at eleven (11) o'clock a. m., the following-described real estate situate, lying, and being in said county of Marion, State of Oregon, to wit: The lands known and designated upon a map or plat filed and recorded in the office of the county clerk of Marion county, Oregon, on November 4, 1876, by Thomas Cross, deceased, as lots numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, and thirty-seven, containing one thousand three hundred and seventy-three and $\frac{86}{100}$ acres, more or less, and being situate in township six south, of range three west, Willamette meridian. Said above-described lands will be sold in the following parcels, to wit: Lots 1, 2, 3, 4, and 5, containing 230.48 acres; lots 6, 7, 8, and 9, containing 160 acres; lots 12, 13, and 25, containing 146.22 acres; lots 11, 14, and 24, containing 120 acres; 10, 15, and 23, containing 120 acres; 16, 17, 21, and 22, containing 160 acres; 18, 19, and 20, containing 120 acres; 29, 30, 31, 32, 33, and 34, containing 240 acres; 26, 27, 28, 35, 36, and 37, containing 267.32 acres.

Also the following-described land: The donation land claim of John Baum and Phebe D. Baum, his wife, certificate number 2757, notification number 632, described as follows: The west half and northwest quarter of the northeast quarter, and lots numbered one, two, three, four, and five of section seven, and lots numbered one, two, three, four, five, and six of section eight, all in township eight south, range two west, containing 615.06 acres, more or less; also the north half of the donation land claim of William N. Rector and Ann Rector, his wife, said claim being designated at the land office as donation claim number 45, and embracing part of sections seven, eight, seventeen, and eighteen, in township eight south, range two west, the said north half of said claim containing 320 acres, more or less. 139

Also the south half of block 30, in the city of Salem, county and State aforesaid; also parts of lots 1 and 2, in block 20, in said city of Salem, and described as commencing at a point on the north line of lot No. 1 aforesaid 60 feet east from the northwest corner of said lot one, thence south at right angles to the south line of lot No. 2 aforesaid; thence east 22 feet 6 inches; thence north at right angles to the north line of said lot one; thence west 22 feet 6 inches to the place of beginning; also lot No. 3, in said block No. 20, save and except the following-described part thereof, to wit: Commencing at the northwest corner of said lot No. 3, thence south along the west line of said lot No. 3 twenty feet; thence east 60 feet parallel with the north line of said lot 3; thence north at right angles 20 feet; thence west 60 feet to the place of beginning.

Deeds at the expense of purchasers.

JOHN C. LEWIS, *Receiver.*

Dated August 10th, 1885.

140 EXHIBIT "B."

In the U. S. Circuit Court, District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } In Chancery.

Receipt of A. B. Richardson.

Received, this eighteenth day of September, A. D. 1885, of John C. Lewis, receiver of said court, by whom the property described in the decree entered in the above-entitled cause on the 25th day of May, A. D. 1885, was sold on the seventeenth day of September, A. D. 1885, the sum of fifty dollars, in full for services as auctioneer as per agreement.

A. B. RICHARDSON.

Duplicate.

SALEM, OREGON, *Oct. 6th*, 1885.

John C. Lewis to E. M. Waite, Dr.

1885.
Aug. 12. 100 posters ---------- 3 75

Paid.

E. M. WAITE.

141 SALEM, OREGON, *August* 14, 1885.

Jno. C. Lewis, to Oregon Statesman, Dr.

Aug. 14. To publishing attached advertisement in Weekly Statesman 5 weeks, 11½ squares, at $3 ---------- 34 50

Paid in full Oct. 7.

STATESMAN PUB. CO.,
By R. J. HENDRICKS.

(Attached to the above receipt is the following :)

Receiver's Sale.

In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JOHNATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

142 Notice is hereby given that under and by virtue of an order of the circuit court of the United States for the district of Oregon, duly made and entered in the above-entitled cause on the 25th day of May, A. D. 1885, and to me directed, I, the undersigned, the duly appointed, qualified, and acting receiver in said cause, will sell at public auction, to the highest and best bidder, for cash, at the court-house door, at Salem, Marion county, State of Oregon, on Thursday, the 17th day of September, A. D. 1885, between the hours of nine o'clock a. m. and four o'clock p. m., to wit, at eleven (11) o'clock a. m., the following-described real estate situate, lying, and being in said county of Marion, State of Oregon, to wit: The lands known and designated upon a map or plat filed and recorded in the office of the county clerk of Marion county, Oregon, on November 4, 1876, by Thomas Cross, deceased, as lots numbered one, two, three, four, five, six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen, nineteen, twenty, twenty-one, twenty-two, twenty-three, twenty-four, twenty-five, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty, thirty-one, thirty-two, thirty-three, thirty-four, thirty-five, thirty-six, and thirty-seven, containing one thousand three hundred and seventy-three and $\frac{86}{100}$ acres, more or less, and being situate in township six south, of range three west, Willamette meridian. Said above-described lands will be sold in the following parcels, to wit: Lots 1, 2, 3, 4, and 5, containing 230.48 acres; lots 6, 7, 8, and 9, containing 160 acres; lots 12, 13, and 25, containing 146.22 acres; lots 11, 14, and 24, containing 120 acres; 10, 15, and 23, containing 120 acres; 16, 17, 21, and 22, containing 160 acres; 18, 19, and 20, containing 120 acres; 29, 30, 31, 32, 33, and 34, containing 240 acres; 26, 27, 28, 35, 36, and 37, containing 267.32 acres.

Also the following-described land: The donation land claim of John Baum and Phebe D. Baum, his wife, certificate number
143 2757, notification number 632, described as follows: The west half and northwest quarter of the northeast quarter and lots numbered one, two, three, four, and five of section seven, and

lots numbered one, two, three, four, five, and six of section eight, all in township eight south, range two west, containing 615.06 acres, more or less; also the north half of the donation land claim of William N. Rector and Ann Rector, his wife, said claim being designated at the land office as donation claim number 45, and embracing part of sections seven, eight, seventeen, and eighteen, in township eight south, range two west, the said north half of said claim containing 320 acres, more or less.

Also the south half of block 30, in the city of Salem, county and State aforesaid; also parts of lots 1 and 2, in block 20, in said city of Salem, and described as commencing at a point on the north line of lot No. 1 aforesaid 60 feet east from the northwest corner of said lot one; thence south at right angles to the south line of lot No. 2 aforesaid; thence east 22 feet 6 inches; thence north at right angles to the north line of said lot one; thence west 22 feet 6 inches to the place of beginning; also lot No. 3, in said block No. 20, save and except the following-described part thereof, to wit: Commencing at the northwest corner of said lot No. 3, thence south along the west line of said lot No. 3 twenty feet; thence east 60 feet parallel with the north line of said lot 3; thence north at right angles 20 feet; thence west 60 feet to the place of beginning.

Deeds at the expense of purchasers.

JOHN C. LEWIS, *Receiver.*

Dated August 10th, 1885.

(Endorsed:) Filed Oct. 10, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

144 And afterwards, to wit, on the 28th day of October, 1885, there was duly filed in said court a replication in words and figures as follows, to wit:

145 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,

vs.

ELIZA O'DONALD & JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

The replication of L. H. Allen, complainant, to the answer of Edwin C. Cross and Frank Cross, the latter sued herein by Edwin C. Cross, his guardian *ad litem*, defendants.

This repliant, saving and reserving unto himself all and all man-

ner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto saith that he will aver
146 and prove his said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answer of said defendants is uncertain, untrue, and insufficient to be replied unto by this repliant.

Without this, that any other matter or thing whatsoever in the said answer contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true.

All which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

FECHHEIMER & ACH,
Counsel for Complainant.

(Endorsed:) Filed Oct. 28, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy.

147 And afterwards, to wit, on the 30th day of October, 1885, there was duly filed in said court an account of receiver in words and figures as follows, to wit:

148 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, the Latter a Minor, Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

To the honorable the judges of the above-entitled court:

This the account of John C. Lewis respectfully shows and avers—

That he was duly appointed receiver herein on the 25th day of August, 1884, and that the following is a full and complete statement of his receipts and disbursements since his said appointment.

That incident to his office as such receiver he took possession of all the properties in the bill of complaint described and did let and lease thereof under order of this court herein heretofore made.

That in so doing it became necessary and proper to employ
149 an agent at Salem to assist in collecting the rents and in letting said properties; that John G. Wright, of Salem, was so employed by your receiver.

That your receiver has received in rents to the present time in money and in products reduced to money the sum of $3,002 26
That your receiver has received of and from sales of land the sum of 44,759 04

$47,841 30

That in addition your receiver has on hand in products undisposed of—
466 sacks of oats,
1,634 bushels of wheat, and
190 sacks of rye.

That the sum of $85.00 is due me for rents from persons who have left the rented premises and who are irresponsible and from — a collection cannot be enforced.

That I have expended the following sums:

1884.		
Sept.	300 lbs. salt for hay	$2 25
"	Hauling hay, 20; weighing same, 2.50	22 50
"	Bill of lumber, 26.80; hauling same, 3.00	29 80
"	Sack twine, .75; nails, 4.12	4 87
Nov.	172 wheat sacks, at 7c	12 04
"	Weighing hay	75
"	Hauling oats	5 55
"	Insurance on buildings in Salem	29 10
"	Hauling oats	7 74
"	Board of carpenter on farm	10 00
"	Farm labor	20 00
150		
1884.		
Nov.	Hauling oats to Lincoln	$54 45
Oct.	Freight on wheat from Lincoln	32 90
	" " oats " "	15 50
	" " wheat " "	19 05
	Storage at Lincoln	52 00
	Labor resacking at Lincoln	2 75
Dec.	Carpenter, 15 days' work on houses & barns	45 00
"	Hauling oats to Lincoln	4 85
"	Window-glass	75
"	Freight & storage to L. Abrams	184 02
	Amount forward	555 87
	Amount brought over	555 87
1884.		
Dec.	School taxes	36 44
"	Expenses 5 trips to Salem	60 00
"	John G. Wright, services	150 00
1885.		
Jan'y.	Repairing sidewalks in Salem	5 50
"	Lumber for same	13 79

1885.		
April.	Road tax, dist. No. 13	2 00
"	Repairs shed on Commercial St., Salem	1 00
"	1 well-bucket	1 00
May	1,500 shakes for barn	18 75
	Work on bridge & barn	8 25
	500 shakes for barns	5 75
June.	9½ days' carpenter work on bridges on farm	23 75
	Nails	1 00
	Labor on Mill Creek farm	34 50
	Repairs Liberty St. walks, Salem	3 30

151

1885.		
July.	Repairing fences, to F. Tooze	50 00
	Carpenter, on barns & bridges	28 75
	Weighing hay	2 50
	Lumber bill	52 64
	Iron rods for barns	25 25
	City tax, Salem	21 42
	1,000 wheat sacks, 50.; freight on same, 3.45	53 45
Sept.	A. B. Richardson, auctioneer, sale of lands	50 00
	Printing posters, " "	3 75
	Advertising, " "	34 50
	J. G. Wright in full	150 00
	Amount forward	1,393 16
	Amount brought over	1,393 16
1885.		
Sept.	Expenses receiver's trips to Salem, about 8 in number	75 00
Oct.	Lumber bill	6 70
	Total expenditures	$1,474 86

Leaving a balance in your receiver's hands in money of $47,841 20

Wherefore your petitioner prays that this his account be approved.

JOHN C. LEWIS, *Receiver.*

FECHHEIMER & ACH,
Att'ys for Receiver.

STATE OF OREGON, }
Multnomah County, } *ss:*

I, John C. Lewis, being first sworn, on oath say I am the petitioner above named; that the foregoing account is true, as I verily believe.

JOHN C. LEWIS.

Subscribed & sworn to before me this the 29th October, A. D. 1885.
J. B. THOMPSON, [SEAL.]
Notary Public for Oregon.

(Endorsed:) Filed Oct. 30, 1885. R. H. Lamson, clerk.

152 And afterwards, to wit, on the 30th day of October, 1885, there was duly filed in said court a petition of receiver for compensation in words and figures as follows, to wit:

153 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis Cross, His Wife; Edwin C. Cross, P. May Wilson, and John T. Wilson, Her Husband; Frank Cross, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright, and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

To the honorable the judges of the circuit court of the above-entitled court:

This the application of John C. Lewis respectfully shows and avers that he was on the 25th day of August, A. D. 1884, by the above court duly appointed receiver in the above-entitled cause, and that he immediately qualified as such receiver, and ever since has been and still is acting as such receiver.

That immediately after his said appointment your receiver took charge of all the real property mentioned and described in
154 the bill of complaint herein and examined into the character and requirements thereof.

That said property consisted principally of agricultural lands in Marion county, Oregon.

That your petitioner, the receiver herein, deemed it to the best interest of the parties to this suit to let and lease said lands, and so did let and lease the same; that the rental of most thereof was in products of said land, which your receiver was compelled to take, prepare for and market the same.

That the said lands and property received care and attention from your receiver in and about keeping the same in condition and repair.

That your receiver was compelled to and did make some fifteen trips to Salem in the doing of his duties as receiver, and did visit said farms and properties; that in the conducting of his affairs as such receiver he was compelled to and did employ counsel to assist,

advise, and counsel him, and said counsel did bestow much time and attention in said matter and did make several trips to Salem with your receiver and in his interest.

That there has been no order of allowance for your receiver or for his attorneys.

That, in pursuance of an order of this court, your receiver did sell a large amount of the lands and property described in the bill, and did realize therefrom a large sum of money, to wit, the sum of $44,759.04.

That your receiver and his counsel bestowed much time and labor*ing* in managing and preparing said lands for sale and in effecting the sale thereof.

Wherefore your petitioner prays that an order be made
155 herein of an allowance to your petitioner and to his attorneys of such sum as may seem proper and just.

JOHN C. LEWIS, *Receiver.*

FECHHEIMER & ACH,
Att'ys for Receiver.

STATE OF OREGON,
County of Multnomah.

I, John C. Lewis, being first sworn, on oath say I am the petitioner above named; that the foregoing petition is true, as I verily believe.

JOHN C. LEWIS.

Subscribed and sworn to before me this the 29th day of October, A. D. 1885.

[SEAL.]

J. B. THOMPSON,
Notary Public for Oregon.

(Endorsed:) Filed Oct. 30, 1885. R. H. Lamson, clerk.

156 And afterwards, to wit, on Friday, the 30th day of October, 1885, the same being the 17th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

157 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

OCTOBER 30, 1885.

Now, at this day, comes Mr. Henry Ach, of counsel for complainant, and presents to the court the report and account of Mr. John C. Lewis, receiver herein, and also the application of said receiver for an allowance for his services and expenses.

Whereupon it is ordered that said report and account and application be, and they are hereby, referred to Mr. George H. Durham, master of this court, to examine and to report thereupon after due notice to the parties and after taking such testimony thereon as may be necessary.

DEADY, *J.*

(Endorsed:) Filed Oct. 30, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

158 And afterwards, to wit, on the 2nd day of November, 1885, there was duly filed in said court a motion in words and figures as follows, to wit:

159 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

Comes now the complainant herein, by his counsel, Messrs. Fechheimer & Ach, and move- this honorable court for an order confirming the sale made in this cause by John C. Lewis, the receiver herein, on the 17th day of September, A. D. 1885, as appears from the said receiver's return of such sale on file herein.

Dated October 26th, 1885.

FECHHEIMER & ACH,
Counsel for Complainant.

(Endorsed:) Filed Nov. 2, 1885. R. H. Lamson, clerk.

160 And afterwards, to wit, on the 9th day of November, 1885, there was duly filed in said court a consent that sale be confirmed, in words and figures as follows, to wit:

161 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

We, the undersigned, hereby consent that the sale of the property made by the receiver herein on September 17, 1885, as shown in said receiver's report of said sale filed in this cause on October 10, 1885, may be in all respects confirmed by this court.

Dated Nov. 5th, 1885.

W. H. HOLMES,
Counsel for E. C. & Frank Cross and for E. C. Cross, Guardian ad Litem of Frank Cross.
L. H. ALLEN,
By his attorneys, FECHHEIMER & ACH.

(Endorsed:) Filed Nov. 9, 1885. R. H. Lamson, clerk.

162 And afterwards, to wit, on Tuesday, the 10th day of November, 1885, the same being the 22nd judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

163 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

NOVEMBER 10, 1885.

Now, at this day, on motion of Mr. Henry Ach, of counsel for complainant, it is ordered that the report of sale and distribution filed herein by the receiver on October tenth, eighteen hundred and eighty-five, be, and the same is hereby, confirmed.

DEADY, *J.*

(Endorsed:) Filed Nov. 10th, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

164 And afterwards, to wit, on the 11th day of November, 1885, there was duly filed in said court a report of master in words and figures as follows, to wit:

165 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

CITY OF PORTLAND, *District of Oregon,* } *ss:*

The report and account of the receiver herein and his application for an allowance for his services and expenses having been heretofore referred to me for examination and report, and due notice of the time and place of the hearing thereof having been by me given to the respective counsel of the parties appearing in the cause, the said matters came on for hearing at my office, in Portland, Oregon, on this 6th day of November, 1885, at the hour of 11 a. m., the said receiver appearing by Mr. H. Ach, his counsel, when the following proceedings were had, to wit:

GEO. H. DURHAM, *Master.*

JOHN C. LEWIS was called as a witness on his own behalf and, being duly sworn, testifies as follows:

My name is John C. Lewis; residence, Portland, Oregon; am the receiver in this case. I was appointed receiver herein on August 4, 1884, and have been *the* such receiver ever since.

I thereupon gave my bonds in the sum of $10,000, and after qualifying fully I went to Salem and took charge of the property; went up afterwards and looked after receiving the grain rents of
166 the farms, and made seven or eight trips to the property shortly after my appointment. I rented the farms to five different lessees, repaired the fences, houses, and barns on the property, and generally cared for the property. The rents came in in grain, which I stored in warehouses and disposed of from time to time to the best advantage. During last winter the snow broke down one of the barns, which I caused to be properly repaired and roofed. Some bridges on the ranches washed out, which I rebuilt, as well as some of the fences, which washed away. I underpinned one of the barns. I leased the property again for the second year to different parties and collected the rents again in produce, which I prepared for market.

The city property in Salem I rented. During the second year I made some eight or nine trips from Portland to the property in looking after it. An average of at least three days was spent on each trip. I then prepared some of the agricultural lands for sale, as well as city property, and sold the same for upwards of $44,000, executed certificates of sale therefor, and made applications for confirmation.

I have had Messrs. Fechheimer & Ach employed as my attorneys from the date of my employment. I have given these lands and property a general attention from the time of my appointment to the present time.

For the total amount of rents collected and expenditures made I refer to my account herein, filed Oct. 30th, 1885.

I had to look after taxes on the property and street assessments on the city property. I think my services for the 15 months I have acted as receiver are worth $1,500.

The expenses mentioned in my account were all necessary ones in the care and management of the property.

JOHN C. LEWIS.

167 HENRY ACH, being called as a witness by the receiver & duly sworn, testifies as follows:

My name is Henry Ach; residence, Portland; am a lawyer and member of the law firm of Fechheimer & Ach. My firm has been acting as the attorney for the receiver in this cause from the date of his appointment to the present time. In acting as such attorneys we have from the date of the receiver's appointment until now advised him as to his duties as such. We have prepared the accounts and applications made by said receiver, being several in number. We have drafted the leases for the lands, obtained an order of court permitting the letting of the lands of the estate. Several trips were made by us to Salem in the interest of said receiver. We attended to the sale of the lands, prepared advertisements of sale and the certificates of sale when sold.

In my opinion the reasonable value of said services up to the present time is $1,000.

HENRY ACH.

P. L. WILLIS, being called as a witness, testifies as follows:

My name is P. L Willis; live in Portland, Oregon; am an attorney-at-law, practicing in said city; I have read the testimony of Henry Ach herein, and in my opinion $1,000 is a reasonable attorney's fee for the services performed by Fechheimer & Ach for said receiver.

P. L. WILLIS.

H. Y. THOMPSON, being called as a witness, testifies as follows:

I am an attorney, practicing at Portland, Oregon, where I reside. I have heard Mr. Ach's testimony, and, assuming its correctness and that the estate in question was of the value of $30,000 or up-
168 wards, I think $1,000 is a reasonable charge for the services of the receiver's said attorneys.

H. Y. THOMPSON.

JOSEPH SIMON, being called as a witness and duly sworn, testifies:

My name is Joseph Simon; residence, Portland, Oregon; I am a practicing attorney; I have read Mr. Ach's testimony, and, assum-

ing the facts therein stated to be correct, as I have no doubt they are, I think the services in question are reasonably worth $1,000.

JOSEPH SIMON.

GEO. H. DURHAM, *Master.*

169 L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } Report.

To the honorable judges of the above-entitled court:

In pursuance of an order of this honorable court, made in the above cause and dated Oct. 30, 1885, I, the subscriber, one of the masters of this court, at once set the matters so referred to me for hearing, at my office in Portland, Oregon, at 11 o'clock a. m., Nov. 6, 1885, and thereupon gave notice to that effect to the counsel for the respective parties.

At said time and place Mr. John C. Lewis, the receiver herein, with his counsel and witnesses, attended upon me, and, having taken the testimony of the several witnesses produced before me upon the matters directed to be enquired into by such order and having examined said account of said receiver and considered the same, do report—

That I find the expenditures shown in said account were necessary and proper in the custody and management of the estate and were reasonable.

That the receiver has given much time and labor to the management of said estate and is entitled to compensation therefor; that $1,500 would be a reasonable allowance for such compensation, taking into consideration the time consumed, work done, amount of the estate, and the responsibility incurred in its management.

That Messrs. Fechheimer and Ach have, since the receiver's appointment, acted as his counsel and have rendered him continuous service in and about the business of the estate aforesaid; that the receiver should be allowed a reasonable compensation for
170 said attorneys, and from the testimony taken I find that $1,000 would be a reasonable allowance therefor.

I therefore recommend that the account of the said receiver be allowed and approved; that his application for compensation for himself and his counsel be granted to the extent suggested, viz., $1,500 for himself and $1,000 for his attorneys, upon the condition that this allowance for attorneys shall be full compensation for all services rendered the receiver in the matter of his receivership.

All of which I respectfully submit.

GEO. H. DURHAM, *Master.*

(Endorsed:) Filed Nov. 11, 1885. R. H. Lamson, clerk.

171 And afterwards, to wit, on the 11th day of November, 1885, there was duly filed in said court a consent in words and figures as follows, to wit:

172 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD *et al.*, Defendants.

Comes now the complainant herein and consents that the account of the receiver filed herein on the 30th day of October, 1885, may be allowed as filed, and that the compensation allowed the receiver and his attorneys by the master herein may be allowed such receiver and his attorneys by this court.

Dated Nov. 9th, 1885.

L. H. ALLEN,
By C. H. LEWIS.

(Endorsed:) Filed Nov. 11, 1885. R. H. Lamson, clerk.

173 And afterwards, to wit, on Wednesday, the 11th day of November, 1885, the same being the 23rd judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

174 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

NOVEMBER 11, 1885.

Now, at this day, on motion of Mr. Henry Ach, of counsel for complainant, it is ordered that the report of Mr. George H. Durham, one of the masters of this court, to whom was referred the report and account of the receiver herein, and the petition of said receiver for an allowance for his services and for attorney's fees be, and the same is hereby, approved.

DEADY, *J.*

(Endorsed:) Filed Nov. 11, 1885. R. H. Lamson, clerk, by R. B. Lamson, deputy clerk.

175 And afterwards, to wit, on the 21st day of January, 1886, there was duly filed in said court a stipulation in words and figures as follows, to wit:

176 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD *et al.*, Defendants.

In this cause it is hereby stipulated that the complainant's time to take his testimony herein may be extended sixty days from the 26th

inst., and that def'ts, E. C. and Frank Cross, may have thirty days beyond such extension in which to take their testimony.

Dated January 20th, 1886.

W. H. HOLMES,
Counsel for Defendants, E. C. & Frank Cross.
FECHHEIMER & ACH,
Counsel for Complainant.

(Endorsed:) Filed January 21, 1886. R. H. Lamson, clerk, by R. B. Lamson, deputy.

177 And afterwards, to wit, on the 27th day of March, 1886, there was duly filed in said court a stipulation in words and figures as follows, to wit:

178 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD *et al.*, Defendants.

In this cause it is hereby stipulated that complainant's time to take testimony herein may be extended thirty (30) days from this date, and that defendants, Edwin C. and Frank Cross, may have thirty (30) days thereafter to take their testimony.

Dated March 27th, 1886.

HENRY ACH,
Counsel for Complainant.
W. H. HOLMES,
Of Counsel for E. C. & Frank Cross.

(Endorsed:) Filed March 27, 1886. R. H. Lamson, clerk.

179 And afterwards, to wit, on Monday, the 29th day of March, 1886, the same being the 88th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

180 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

MARCH 29, 1886.

Now, at this day, on motion of Mr. C. E. S. Wood, of counsel for complainant, and upon the stipulation of the parties filed herein, it is ordered that the time allowed the complainant to take testimony be, and the same is hereby, extended to April 26, 1886, and that the

defendants, Edwin C. Cross and Frank Cross, have thirty days thereafter to take their testimony herein.

DEADY, *J.*

(Endorsed:) Filed March 29, 1886. R. H. Lamson, clerk.

181 And afterwards, to wit, on the 6th day of April, 1886, there was duly filed in said court a stipulation in words and figures as follows, to wit:

182 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JOHNATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband, and James Cross and Francis Cross, His Wife; Edwin C. Cross; P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, the Latter Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

In this cause it is hereby stipulated, admitted, and agreed upon by and between the complainant herein and the defendants, Edwin C. Cross and Frank Cross, a minor, said minor sued herein and defending by and through Edwin C. Cross, his guardian *ad litem*, said stipulators acting by and through their respective counsel, in this cause as follows, to wit:

First. That the def'ts, P. Mae Wilson, Edwin C. Cross, and
183 Frank Cross, are the only heirs-at-law of said Thomas Cross and Pluma F. Cross, both deceased.

Second. That the def'ts, Eliza O'Donald, William F. Cross, Caroline M. Wright, and James Cross, are the heirs-at-law of said Thomas and Malinda Bowen Cross, who was the first wife of said Thomas Cross, and that said Malinda died in Wisconsin on or about the time stated in the joint answer of said Edwin C. and Frank Cross; that there is now due to complainant upon the promissory notes first in the bill of complaint herein mentioned the full sum of forty-five thousand one hundred and thirty-seven and $\frac{4}{100}$ dollars ($45,137.04), with interest thereon, at the rate of ten per cent. per annum, from December 22nd, 1881, and that there is now due to complainant upon the promissory note second in said bill of complaint mentioned the sum of ten thousand dollars ($10,000), with interest thereon from June 21st, 1880, at one per cent. per month.

Third. That said C. M. Cross, who was the third wife of said Thomas Cross, became divorced from him, and was so divorced at the time of the exhibiting of the complainant's bill of complaint herein.

Fourth. That the deed of Jan. 22nd, 1876, from said Thomas Cross to the def't, C. H. Lewis, though upon its face an absolute deed, was in fact and was intended to be a deed conveying the lands and premises therein described in trust to the said C. H. Lewis for and upon the following trusts:

That said C. H. Lewis should, at the cost and expense of
184 said lands, keep the same in cultivation or lease or let the same or any part thereof; to sell and dispose of the crops and collect the rents, and to apply the same when collected, after deducting all necessary and proper charges and expenses in and about the care, custody, and management and control of said premises as aforesaid, upon said mortgage debts in said bill of complaint set forth; and that it was also understood and agreed upon between the parties to said contract that said C. H. Lewis might at any time sell any portion or portions of said lands, either at public or private sale, with the consent of said Thomas Cross, and upon such sales to apply the net proceeds thereof, after deducting all necessary and proper costs, expenses, and charges thereof, toward the liquidation of the amount due upon the said two promissory notes in the bill of complaint herein mentioned.

Fifth. That the survey and appraisement mentioned in said bill of complaint and the amendments thereto was made at the time, in the manner, and by the persons as therein set forth and alleged, and that the same was openly made and made without fraud, and that the persons who made the same would now, if testifying in relation thereto, approve and verify said appraisements in all particulars.

Sixth. That the defendants, Edwin C. and Frank Cross, could produce five witnesses, all of whom reside and own lands in the vicinity of the lands sold at public auction by said C. H. Lewis, as alleged in the said amendments to said bill of complaint filed herein, and competent witnesses, to give opinions relative to the value thereof,
185 who would testify that said lands at the time of the sale thereof were worth the following sums at private sale in the ordinary course of business, to wit:

1st. The tract of 187.60 acres, more or less, sold to J. I. Thompson for $397.98, which had been appraised at $750.80, was at said time worth $1,000.00.

2nd. The tract of 225.48 acres, more or less, sold also to said J. I. Thompson for $3,435.00, which had been appraised at $3,466.50, was at said time worth $5,000.00.

3rd. The tract of 160.2 acres, sold to C. C. Kunney for $1,680.21, which had been appraised at $1,733.75, was at the said time worth the sum of $3,200.00.

4th. The tract which was sold to S. R. Scott, containing 80 acres, for $480.00, which had been appraised at $560.00, was at the said time worth the sum of $960.00.

5th. The tract containing 209.36 acres, which was sold to said S. R. Scott for $2,600.00, and which had been appraised at $1,913.00, was at the said time worth the sum of $3,200.00.

Sixth ½. That there has been no administration upon the estate of Pluma F. Cross.

Seventh. That all matters and things embraced in the new matter and additional alleged defenses contained in the said answer of said Frank and Edwin C. Cross and not affected by or included in the terms of stipulation heretofore and on the 15 day of September, 1885, filed herein, or of this stipulation, except the question of the extension of the time of payment of said promissory notes, the consideration therefor, if any, and the effect thereof and the laches imputed to the pl'ff and his assignees and the question of the statute of limitations are hereby expressly waived by the defendants, Edwin C. and Frank Cross; and it is further expressly under-
186 stood that nothing contained in the foregoing paragraph shall be construed as waiving the question of the sufficiency of the complaint to constitute a cause of suit against the def'ts signing this stipulation nor of the question of the jurisdiction of this court to foreclose the mortgage described in said complaint as against such def'ts.

It is expressly understood, stipulated, and agreed that nothing in this stipulation contained shall at all affect or modify the effect of any admission contained in the answer of the defendants nor the allegations in the amendments to the bill of complaint contained nor of the stipulations filed herein on Sept. 15th, 1885, nor shall the same be construed as waiving the effect of the allegations in said answer relative to the sale of parts of said lands at public auction without foreclosure and at private sale, but the legal effect of such allegations shall be determined according to the import and significance of the said stipulation of Sept. 15, 1885, and the pleadings on which the same is based; and this stipulation does not *conclude* either party thereto from insisting at the trial of said cause on his right to the pleadings and issues and admissions in the same as evidence to sustain his side of the case when the same is by law and the usages of this honorable court made available for such purposes, and this stipulation shall not be considered as concluding the testimony of the parties to the same, but either party may take further depositions and testimony — introduce other testimony on points not included in this and former stipulation herein filed. Nothing in this stipulation heretofore contained shall be construed to mean that the def'ts or either of them have waived the allegations in their answer concerning the alleged ownership of the land for
187 which these def'ts defend, but it is admitted by the stipulation that Pluma F. Cross, the mother of the def'ts answering herein, was the owner of said lands, as in said answer alleged, and also that she signed the mortgage described in the pleadings in this cause as surety for the debts of her said husband and for no other purpose, as is fully alleged in said answer, nor is any matter or thing or the legal effect thereof waived by either party about which an agreement has been reached by the pleadings in this cause or embraced in any former stipulation herein filed.

HENRY ACH,
Of Counsel for Complainant.
W. H. HOLMES,
Of Counsel for E. C. and Frank Cross.

(Endorsed:) Filed Apr. 6, 1886. R. H. Lamson, clerk.

188 And afterwards, to wit, on the 6th day of April, 1886, there was duly filed in said court a stipulation as to hearing of cause in words and figures as follows, to wit:

189 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross; John G. Wright and Edwin C. Cross, Administrators, &c., and C. H. Lewis, Defendants.

It is hereby stipulated by and between the parties hereto that this cause is closed for the taking of testimony, and that the cause be heard upon the pleadings and evidence taken and stipulations on May 7th, 1886.

HENRY ACH,
For Complainant.
W. H. HOLMES,
Att'y for E. C. and Frank Cross.

(Endorsed:) Filed Apr. 6, 1886. R. H. Lamson, clerk.

190 And afterwards, to wit, on Monday, the 12th day of April, 1886, the same being the 1st judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States judge, presiding—the following proceedings were had in said case, to wit:

191 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

APRIL 12, 1886.

Now, at this day, on motion of Mr. C. E. S. Wood, of counsel for complainant, and upon stipulation filed, it is ordered that this cause be, and the same is hereby, set for final hearing on Friday, May 7, 1886.

DEADY, *J.*

(Endorsed:) Filed April 12, 1886. R. H. Lamson, clerk.

192 And afterwards, to wit, on Monday, the 19th day of July, 1886, the same being the 45th judicial day of the regular

April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

193 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross, P. May Wilson and John Wilson, Her Husband; Frank Cross, a Minor, Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis. } No. 1056.

JULY 19, 1886.

This cause was heard upon the bill and the amendments thereto, the answer of the defendants, E. C. Cross and Frank R. Cross, an infant, by his guardin, E. C. Cross; the replication thereto, the stipulation of the parties, the evidence, and the decree entered herein on January twentieth, eighteen hundred and eighty-five, taking the bill as confessed by the defendants, Eliza O'Donald and Jonathan O'Donald, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Frances E. Cross, his wife; P. May Wilson and John T. Wilson, her husband; Adelia Cross, widow of Thomas Cross; John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, and was argued by Mr.

194 George H. Williams and Mr. Henry Ach, of counsel for the plaintiff, and by Mr. William H. Holmes, of counsel for the defendants, E. C. Cross and Frank R. Cross; on consideration whereof the court finds that the release in eighteen hundred and seventy-six of eight hundred and sixty-two acres and forty-six one-hundredths of an acre of the land included in the mortgage mentioned in the bill herein was done in good faith and on a credit given said Thomas Cross on his debt to Allen and Lewis equal to the market value thereof; that under an order of this court made on May twenty-fifth, eighteen hundred and eighty-five, the receiver herein sold all the remaining lands included in the mortgage, as set forth in the bill and in the amendments thereto, except the lands of Pluma F. Cross, deceased, hereinafter described; that on November tenth, eighteen hundred and eighty-five, said sale was confirmed by an order of this court and the proceeds thereof, amounting to the sum of forty-four thousand seven hundred and sixty-nine dollars and four cents, was applied upon the amount due upon the two notes secured

by said mortgage; that there is now due and unpaid upon said notes the sum of thirty-six thousand four hundred and seventeen dollars and eight cents; that said mortgage executed by Thomas Cross and Pluma F. Cross, his wife, as in the bill alleged, is a valid and subsisting lien upon the lands owned by said Pluma F. Cross therein and hereinafter described; that before the commencement of this suit the notes and mortgage mentioned in the bill were duly endorsed and assigned to L. H. Allen, the plaintiff, and that within six years from the commencement of this suit a payment of interest was made on each of said notes by said Thomas Cross. It is therefore adjudged and decreed that unless within ten days from this date there shall be paid to the plaintiff the said sum of thirty-six thousand four hundred and seventeen dollars and eight cents, with interest thereon from this date at the rate of ten per cent. per annum, together with his costs and disbursements herein, taxed at — dollars,

195 that then and in that case Mr. William B. Gilbert, one of the masters of this court, do proceed to sell in manner and form as upon an execution issued upon a judgment at law all the right, title, and interest that the said Thomas Cross and Pluma F. Cross had at the date of the execution of said mortgage in or to the following-described premises, to wit, a part of the donation land claim of David Leslie and wife, situate in township seven south, of range three west, of the Willamette meridian, known as claim numbered forty-five, commencing at a point in the south boundary line of said claim six chains and twenty-five links south eighty-nine degrees and thirty minutes west from the southeast corner of said claim, running thence north one degree east, parallel to the east line of said claim, eight chains and five links; thence east ten chains and eighty-three links (the last four chains and fifty-eight links of this line being along the south line of said land claim); thence north thirty minutes east seventeen chains and six links; thence west thirty-five chains and seven links; thence south two degrees and thirty minutes west twenty-five chains and thirty links to the south line of the claim; thence north eighty-nine degrees and thirty minutes east along the south line of the claim twenty-five chains and twenty-seven links to the place of beginning, containing eighty acres, more or less; also the donation land claim of F. S. Hoyt and wife, the same being notification numbered sixty-nine and claim numbered fifty-three, in township seven south, of range three west, containing one hundred and thirty-one acres, more or less, together with all the tenements, hereditaments, and appurtenances thereunto belonging; and that out of the proceeds of said sale said master shall first pay the costs and expenses of said sale; second, that he shall pay to the plaintiff the amounts

196 found to be due him as aforesaid; third, if any balance remain he shall pay it into the registry of this court; and it is further ordered that if out of the proceeds of said sale there be not enough to satisfy the amount found due to the plaintiff that the plaintiff may, upon the coming in of the report of said master, apply to this court for a decree against the administrators of the estate of said Thomas C. Cross for the remainder.

(Signed) DEADY, *J.*

Endorsed: Filed July 19, 1886. R. H. Lamson, clerk.

197 And afterwards, to wit, on the 19th day of July, 1886, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

198 United States Circuit Court, District of Oregon.

MONDAY, *July* 19, 1886.

L. H. ALLEN
v.
ELIZA O'DONALD *et al.* } No. 1056.

Suit to enforce the lien of a mortgage.

(1.) Property mortgaged as surety for a debt.—A husband and wife joined in a mortgage, including certain property belonging to each, to secure the payment of the husband's debt, and after the debt was due the husband, with the assent of creditors, conveyed his property to a third person in trust to manage the same and, with the consent of the debtor, to sell and dispose of the same and apply the proceeds on the debt, in pursuance of which authority said trustee sold a portion of said property and applied the proceeds accordingly, and thereupon the creditors released their mortgage on the same: Held: (1) The property of the wife was not discharged from liability for the remainder of the debt by such release unless she was pecuniarily injured thereby; (2) a provision in such mortgage that in case of default in the payment of the debt the mortgage may be foreclosed according to law is mere surplusage and did not prevent the debtor and creditors from making other arrangements for the disposition of his property in satisfaction of the debt and the release of the same from the mortgage without affecting the liability of the wife's property unless it appeared that the property was sacrificed or disposed of at less than its market value, to her injury; (3) the burden of proof is on the creditor to show that such sale was fair and the proceeds justly applied, or that the property of the wife was not thereby wrongly made to bear any more than its proportion of the debt; (4) the voluntary forbearance of the creditors to sue the debtor while this amicable arrangement between him and them for the disposition of his property was being carried out did not amount to an extension of time to the debtor which would discharge the property of the wife from the mortgage, for such forbearance was neither for a time certain nor for a valuable consideration, and left her at liberty to pay the debt and proceed against the husband, subrogated to the rights of the creditors.

(2.) Limitation in equity.—The rule of limitation in a suit in equity on a note and mortgage to recover the contents of the former

and enforce the lien of the latter therefor is the same as in action thereon at law.

(3. Negotiable paper.—By the law merchant a promissory note payable to order or bearer is negotiable as long as it exists unpaid, and the endorsee or assignee thereof may, under § 1 of the judiciary act of 1875 (18 Stat., 470), sue thereon in this court without reference to the citizenship of his endorser or assignor.

(4.) Limitation in case of part payment.—Under § 25 of the Code of C. P. a payment on a promissory note at any time after its maturity by any one who may be compelled to pay the same constitutes the point of time from which the limitation against an action thereon commences to run.

(5.) New matter in an answer in equity.—New matter in an answer in equity or an allegation not responsive to the bill is not evidence, and the burden of proof is on the defendant to support it.

(6.) Responses on information and belief.—General allegations made on information and belief, without any verifying circumstance of time, place, or amount, even when responsive to the bill, are not entitled to much weight as evidence.

DEADY, *J.*:

This suit is brought to enforce the lien of two mortgages executed by Thomas Cross and Pluma F., his wife, to secure the payment of two promissory notes made by said Thomas Cross, the one on November 1, 1871, to the firm of Allen & Lewis for the sum of $30,000, payable in three years after date, with interest at 10 per centum per annum, and the other on January 23, 1872, to the same firm for the sum of $10,000, payable in one year from date, with interest at 12 per centum per annum. The mortgages were also made to Allen & Lewis, and each was executed contemporaneously with the note it was intended to secure. The first one includes 15 parcels of agricultural land situate in Marion county and containing about 3,361.54 acres, and the second one includes the same property and also certain lots and parts thereof situate in Salem, in said county.

The two parcels numbered 14 and 15 were the property of Pluma F., and consist of 80 acres of the donation of David Leslie and the donation of F. S. Hoyt and wife, containing 131 acres.

On September 16, 1872, Pluma F. died, and on January 22, 1876, the notes being still unpaid, Thomas Cross conveyed the premises to Mr. C. H. Lewis, of Portland, and of the firm of Allen & Lewis, on the parol but admitted trust and understanding that Lewis would, at the expense of the property, farm or let the same and apply the rents and profits arising therefrom on the debts secured thereon, and that he might, with the consent of Cross, sell and dispose of the whole or any portion of said land either at public or private sale and apply the net proceeds thereof on said debts.

On February 5, 1884, Thomas Cross died, and soon after the notes and mortgages were indorsed and assigned to Mr. L. H. Allen, of

San Francisco, a member of said firm and the plaintiff herein, who, on August 6, 1884, commenced this suit.

On January, 20, 1885, an order was made that the bill be taken for confessed against all the defendants except Edwin C. Cross and Frank R. Cross, the children and heirs of Pluma F., who on March 10 answered jointly, the latter by the former as his guardian.

During the year 1876 the defendant Lewis, with the approval and co-operation of Thomas Cross, had the portion of the lands lying in township six south and range three west and containing 2,326.37 acres surveyed and divided into tracts of near 40 acres each and a plat thereof made and duly recorded, and the same appraised by Cross and other disinterested and qualified persons. Between October 14 and November 15 of this year Lewis, in pursuance of said trust, sold at private and public sale 862.46 acres of the land so surveyed and appraised for the sum of $8,593.81, the same being $268.16 more than the appraised value thereof, which was applied as follows: (1) $809.85 in payment of the expenses of the sale, including the cost of the survey, plat, and advertisements; (2) $725.50 paid on March 22, 1876, at the request of Cross, to discharge a mortgage on 320 acres of said land given to the board of school land commissioners on June 18, 1867, to secure the payment of the note of Cross of that date for $594, and payable, with interest, one year after date; (3) $221.74 paid on the same day and like request to said board to obtain a deed for 110.87 acres of said land theretofore purchased by Cross from the State; and (4) $6,837.11, being the remainder on the notes aforesaid, and on November 2, 1878, the firm of Allen & Lewis executed a release to Cross discharging the lands so sold from the operation and lien of said mortgage.

On the filing of the bill, it appearing therefrom that the land was not sufficient security for the debt, a receiver was appointed to collect the rents and manage the same; and on May 30, 1885, an order was made, with the consent of the defendants, Edwin C. and Frank R. Cross, that the receiver sell the remaining portion of the property subject to the mortgages except the parcels 14 and 15 aforesaid, and on September 17 he sold the same at auction, receiving for the 2,499 acres of agricultural land $39,344.04, and for the town lots $5,425, in all the sum of $44,769.04, which was applied on the notes, less the sum of $88.25 paid for advertising and an auctioneer.

On March 8, 1885, the cause was before the court on exceptions to the answer of Edwin C. and Frank R. Cross for impertinence therein, namely: (1) That it was stipulated in said mortgages that in default of payment of the notes they should be foreclosed according to law, and no other or different mode of disposing of said lands was provided therein or contemplated by the parties thereto; (2) the sale of a portion of said lands as above stated for $8,593.81 was contrary to the terms and conditions of the mortgages and without the consent of the defendants; that the property so sold was then worth and under ordinary circumstances would have sold for $20,000, and that the expense of said sale was wrongfully charged to the proceeds thereof; and (3) that the lands of Pluma F. included in said mortgages were at the time of such sale and now are worth not

more than $10,000, and therefore the same ought to be released a discharged from the operation and effect of said mortgages.

In support of the answer it was contended that when a credi relinquishes a lien on any portion of his debtor's property witho reducing the debt in an amount equal to the value thereof t property of the surety is so far discharged from liability therefor.

The exceptions were overruled, and in disposing of them the co said: "In round numbers there is now due on these notes not l than $80,000. In the argument for the exceptions it is claim that the whole property included in the mortgages is not sufficie to pay the debt by a much larger sum than the alleged value of t property of the defendants; and if this is so, then the defenda are not injured by what they complain of, and the allegations e cepted to would be no defense to the bill and be clearly impertine But the court cannot say judicially what this 3,661.54 acres of la is worth. It cannot assume that it is only worth $70,000 and n $80,000, though it may fetch either sum when put up at auction.

"The rule seems to be that the burden of proof is on the credi in a case of this kind to show that the surety has not been injur by the transaction. Brandt on S. & G., § 370. It follows that t allegations excepted to are not impertinent, but constitute a go defense to the relief prayed for as to these defendants. The plain must either deny them by a replication or confess and avoid the by proper amendments to the bill." 23 Fed. Rep., 573.

Thereupon, on June 1, 1885, an amendment to the bill was fil setting out in detail the sale of the 862.46 acres aforesaid and t disposition of the proceeds thereof as above stated, and on Septe ber 15 a stipulation was filed to the effect that the answer
199 the original bill should stand as the answer to the amen ment also, and admitting that the allegations in the amen ment, when not denied by the answer, except the one concerni the value of the lands sold in 1876, are true, and on October 28 t usual replication was filed to the answer.

No evidence was taken in the case except the deposition of M Lewis by the defendant on the question of the *bona fides* of t transfer of the notes and mortgages and his consent as creditor the sale of Cross' land in 1876. On April 6 a stipulation concer ing the facts was filed, and the case was finally heard and su mitted on the pleadings and this stipulation and deposition.

From these it appears (1) that there is now due on the note 1871 the sum of $45,137, with interest thereon from December 1 1881, at ten per centum per annum; and on the one of 1872 t sum of $10,000, with interest thereon from January 25, 1879, twelve per centum per annum, less $1,686.35 paid thereon on Fe ruary 1, 1883.

(2.) That the appraisement aforesaid was openly made witho fraud, and that the persons who made the same would, if called witnesses, "approve and verify" the same "in all particulars."

(3.) That the defendants can produce five persons who live a own land in the immediate vicinity of the 862.46 acres of land so in 1876 and qualified to give an opinion concerning the val

thereof who would, if called as witnesses, testify that the same were worth at the time, "at private sale in the ordinary course of business," $13,360, instead of $8,593.81, for which they were sold—a difference of $4,766.19.

On these facts the defense that the creditors released the property of the principal debtor without a corresponding reduction of the debt to the injury of the surety has not a leg to stand on.

The allegation in the answer that the property sold in 1876 was worth $20,000 is not responsive to the bill, and therefore not evidence for the defendants. It is new matter set up as a defense and must be proven. Hart *v.* Ten Eyck, 2 John. Ch., 87; Story's E. P., § 849*a*: 2 Story's E. J., §§ 1528, 1529. There is no evidence to support it, nor does it follow that because five persons owning land in the vicinity of these premises would swear that the property disposed of in 1876 was worth near 50 per centum more than it brought that it was sold for less than its market value. It was sold under exceptionably favorable circumstances, and the result is better evidence of its value than the *ex post facto* conjecture of persons interested in upholding the price of lands in the vicinity. The very appraisement itself, made by the owner of the land in conjunction with others of his selection or approval, ought to far outweigh any such testimony as this. Besides, it is not to be expected that mortgaged property when sold on account of the default of the debtor is to be disposed of "at private sale under ordinary circumstances," whatever that means, but at auction, at a forced sale, for what it will bring in cash. If these five persons were asked what the land would sell for in 1876 under those circumstances they probably would not differ much from the appraisers.

But admitting for the purposes of the argument that the property was even worth at a forced sale $20,000, as alleged in the answer, the fact is of no avail to the defendants. Casting the interest on the amounts admitted to be due on these notes from the dates specified in the admission—four years and seven months in the case of the first one and seven years and six months in the second one—and deducting therefrom the sum of $1,686.35 interest paid on the latter on February 1, 1883, and the proceeds of the sale by the receiver—$44,769.04—from the date of the confirmation of the sale, November 10, 1885, and there is now due on these notes $36,417.08. Now charge the plaintiff, if you please, with the difference between $20,000, the alleged value of the lands sold, and the sum they were actually sold for—$11,406.19—and there is still a deficit of $25,010.89, or over $15,000 more than the value of the surety property.

In the face of these facts it is idle to talk about the surety being injured by the creditor's management of the debtor's property. The only persons who appear to be injured are themselves, and that not because of the mismanagement of the property, but the fact that they trusted the debtor beyond his means of payment.

It is admitted that Mrs. Cross's property was put into these mortgages as a security for her husband's debts, and it is not disputed that if his creditors gave up their lien on any portion of their debtor's property without a corresponding reduction in the amount of the

debt, and the surety will be injured thereby, that her propert is so far discharged.

This rule does not depend on the contract between the surety an the creditor, but on equitable principles inherent in the relation principal and surety, which require that the property of the former pledged to the creditor for the payment of his debt, shall be applie to that purpose, so as to prevent the burden of the debt from being thrown on the surety. A creditor with a lien on his debtor's prop erty is so far a trustee for the surety, and must not do any ac which will deprive him of the benefit of it. On paying the deb the surety is subrogated to the right of the creditor in this respect and if in the meantime the latter has done anything to impair th value of such right the former is so far discharged from his liability Brandt on S. & G., § 370; Hayes *v.* Ward, 4 John. Ch., 129; Bake *v.* Briggs, 8 Met., 129.

But this equitable principle is not to be applied so as to produc inequitable results, as is often the case with the operation of th rule that arbitrarily releases a surety from his liability where th creditor has given the principal an extension of time, without refer ence to the fact of whether the surety was or could be in any way injured thereby.

Therefore where it appears that the surety was in no way preju diced by the release of the debtor's property, because the property of the surety would be needed to satisfy the debt in any event, he cannot complain of such release. The only person who is injured is the creditor.

The contract of the surety in this case was that her property migh be taken to pay her husband's debts, provided they were not paid by him or his property included in the mortgage was insufficient for that purpose.

As the debt was not paid by the debtor and his property pledged for its payment has proved insufficient for the purpose by a sum greater than the value of the surety's property, it is not apparent how the surety could be wronged if the creditors had released the whole of the debtor's property without any reduction of the debt and enforced the mortgage against her property alone. Brandt on S. & G. § 380; Niemcewiz *v.* Gahn, 3 Paige Ch., 642.

The cases of Mayhew *v.* Boyd, 5 Md., 102, and Ives *v.* Bank, 12 Michigan, 362, cited by counsel for the defendants on this question are not in point. They both turned on the construction of the contract between the creditor and surety, and not the application of the equitable rule in question; and I may add that the Maryland case carries the doctrine of the arbitrary right of the surety to be discharged from his obligation by a mere extension of time to the debtor, whether he is thereby prejudiced or not, to the very verge, and manifestly so as to do injustice to the creditor in the particular case.

Other technical defenses to this suit are made in the answer and reserved in the stipulation of April 6; and first—

The creditors from time to time, for a sufficient consideration from

Cross, extended the time of payment of these notes, whereby the property of the surety was discharged from all liability thereon.

This part of the answer is made on information alleged to have been derived from Thomas Cross in his lifetime concerning matters which transpired when the defendants were children. The statement of the matter is very vague and general, without a single verifying circumstance of time, place, amount, or name except that of a dead man. Such an allegation is of little force as evidence, even if made in response to the bill. 1 Dan. Ch., 846, note 1.

But it is not made in response to any allegation in the bill. It is new matter set up as a defense. The burden of proof to establish it is on the defendants, and their answer is not evidence in support of it. Hart *v.* Ten Eyck, 2 John. Ch., 87; Story's E. P., § 849*a*; 2 Story's E. J., §§ 1528, 1529.

No evidence is offered by the defendants on the point. In their answer they allege that the only living person who is cognizant of the fact of the extension of time is the defendant Lewis, and he is interested against them, and the facts can only be obtained from him by subpœnaing and examining him as a witness in the cause; which they have failed to do. It is not necessary to say in this community that if the defendants or their counsel believed that Mr. Lewis had made any such arrangement with Mr. Cross in his lifetime they would not have hesitated to call him as a witness and take his testimony on the subject, let his interest in the result be what it may.

However, it is argued that the conveyance of the premises to Mr. Lewis on the trusts mentioned was in effect an extension of time for payment to Cross, but there is nothing in the facts or the nature of the transaction to support the assertion. Cross was the legal owner of the property he mortgaged, and could sell it, subject to the mortgage, to whom he pleased, and all that Lewis did with it he might have done himself; but it was convenient and satisfactory to the parties that one of the creditors should become the trustee of the legal title in this amicable attempt to dispose of the property and apply the proceeds on the indebtedness. The surety had no right to object to the proceeding, and if the property was fairly disposed of under the circumstances she could not be injured by it.

200 And it may be even admitted that this arrangement with Mr. Lewis fairly implied that the firm of Allen & Lewis would whilst it was being carried out forbear to sue the debtor. But there is no evidence of any agreement thereabout or consideration therefor. An agreement to give the debtor time is not binding unless made for some definite period and on a sufficient consideration. And although the creditor should, in pursuance of an agreement or understanding, express or implied, actually forbear to sue for a given length of time, but without any consideration therefor, the surety is not thereby discharged; and the reason is apparent. Such an arrangement is not binding, and therefore it does not prevent the surety from paying the debt and proceeding with the right of the creditor to enforce the claim against the debtor. Brandt on S. & G., § 296.

Second. The property could not be lawfully sold otherwise th on the decree of a court given in a suit to enforce the lien of mortgage as provided therein.

This provision in the mortgage giving the creditors a right case of default in payment to enforce the lien of the mortgage legal proceedings is a mere superfluity. The law gave them t right, and, notwithstanding the provision, the creditors and the deb were at liberty to make any disposition of the property they saw for the purpose of paying the debt or any portion of it, and the sur has no right to complain of it unless she can show she was inju by it, which she was not, but rather the contrary, for it goes with saying that the property sold under this arrangement brought m than it would at an ordinary sheriff's sale.

Third. The suit is barred by the lapse of time or laches of creditors.

"In the consideration of purely equitable rights and titles cou of equity act in analogy to the statute of limitations, but are bound by it." Manning *v.* Hayden, 5 Saw., 379. "When an act upon a legal title to land would be barred by the statute courts equity will apply a like limitation to suits founded on equita rights to the same property." Hall *v.* Russell, 3 Saw., 515. " cases of concurrent jurisdiction, such as matters of account, c where the party may proceed either at law or in equity the stat of limitations applies with equal force in both courts. In such ca courts of equity consider themselves within the spirit of the stat and act in obedience to it, but in the consideration of purely eq table rights and titles they act in analogy to the statute, but are bound by it." Hall *v.* Russell, 3 Saw., 515; Wood on Lim., § 58

The remedy on these notes is a case of concurrent jurisdicti and the limitation prescribed by the statute of the State, six yea applies in this suit as well as an action at law. Therefore the qu tion of laches does not arise in the case. The plaintiff has all time the statute gives him and no more in any case. Section 23 the Code of C. P. regulates the effect of a payment of principal or terest on a note after it becomes due and declares "the limitati shall commence from the time the last payment was made."

In Sutherlin *v.* Roberts, 4 Or., 378, it was held that the fact part payment on a note is made the test by this section for asc taining whether an action thereon is barred, and if not barred same may be maintained on the original promise, and that person who could be compelled to pay the note is competent to m the payment. The payment in that case was made by the adm istrator of the payor.

The first of these notes, allowing three days of grace, fell du November 4, 1874, when the statute commenced to run, and i payment had intervened the bar would have been complete by same day in 1880, but on January 1, 1877, and in 1878, 1880, on December 22, 1881, payments of interest were made on the amounting to $5,780.71. The second note, allowing days of g fell due on January 26, 1873. The interest was paid in full to uary 25, 1879, one day before the statute had run, but wheth

on that day or year by year as it fell due does not appear, but presumably the latter. However, it is a matter of no moment here. On February 1, 1883, a payment of interest was made thereon of $1,686.35. This suit was commenced on August 6, 1884, when six years had not elapsed since the last payment on either note, and therefore the remedy on them is not barred.

I am aware that in the opinion in Sutherlin *v.* Roberts, 387, it is said that the payment must be made "before the limitation has expired"—before the six years have run. This was not the question before the court and the expression is probably an inadvertence. At common law the effect of a part payment never depended on the time when it was made. Whenever made it had the same probative force, as acknowledgment of the existence of the debt, from which the law implied a new promise. In Sigourney *v.* Drury, 14 Pick., 387, it was held that a part payment by the maker of a note after the statute had run revived it against himself and his surety as well.

The language of the statute is "whenever any payment of principal or interest has been or shall be made upon an existing contract * * * after the same shall have become due," etc.

But this is not a material question here. As to the first note, it is clear that no period of six years ever elapsed between the time it became due and the bringing of the suit in which there was not a payment of interest. As to the second one, the margin is small but sufficient. By its terms it was payable one year from date, which was January 23, 1873, and to this the statute (Or. laws, p. 718, § 5) added three days, called days of grace. Mullen *v.* Abbott, 1 Or., 258.

So the note was really not due and payable until January the 26th, and in default of payment the right of action thereon accrued on the 27th, and was barred within six years thereafter.

Fourth. The court has no jurisdiction of the suit.

Under this head two points are made in the argument: (1) The assignment is collusive for the purpose of confirming jurisdiction. The defendants in their answer admit that after the presentation of these claims to the administrators of the estate of Thomas Cross and their rejection by them Allen & Lewis, for a valuable consideration to them paid by the plaintiff, duly endorsed and delivered to the plaintiff the notes aforesaid, and at the same time assigned to him the mortgages; and Mr. Lewis testifies that he has no pecuniary interest in the mortgages, and that they were transferred to plaintiff in good faith and without collusion. Nothing appearing to the contrary, this is satisfactory.

But it may be well to observe that the defendants, having substantially admitted in their answer the *bona fides* and sufficiency of the transfer, are now in no condition to question or gainsay it. Besides, this defense must have been made by a plea in abatement, prior to answer to the merits, alleging the collusive character of the transfer and praying judgment that the suit abate in consequence thereof. Rule 40.

(2.) These notes were overdue when indorsed to the plaintiff, and therefore were not "negotiable by the law merchant," within the

meaning of the judiciary act of 1875, and as an action could not have been maintained on them in this court by the indorsers, Allen & Lewis, the latter of which is a citizen of this State, no such action can be maintained by their assignee, the plaintiff.

The jurisdiction conferred on this court by § 1 of the judiciary act of 1875 (18 Stat., 470), and which includes this case on account of the citizenship of the parties, is thus qualified: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in case of promissory notes negotiable by the law merchant and bills of exchange."

But the contention of the defendants on this point is not supported by the law merchant, according to which negotiable paper continues such as long as it exists unpaid.

At common law no contract was assignable, so as to give the assignee a right of action thereon in his own name. In time, by the growth and recognition of what is called the law merchant, bills of exchange first and then promissory notes, payable to order or bearer, became exceptions to this rule. They are known as "negotiable paper," which means they may be transferred by indorsement or delivery, so as to give the holder a right to sue on the contract in his own name. Attendant on this quality of negotiability are certain consequences, as the liability of the indorser if due demand is made on the acceptor or maker and notice given of his default, and the right of a *bona fide* holder, before maturity, to enforce the bill or note against the acceptor or maker, irrespective of any defense which might be set up in an action by the payee thereof.

As was said by Mr. Justice Strong in Shaw *v.* Railroad Co., 101 U. S., 56, from whose instructive opinion therein I have substantially condensed the foregoing statement of the law: "But none of these consequences are necessary attendants or constituents of negotiability or negotiation. That may exist without them. A bill or note past due is negotiable if it be payable to order or bearer, but its endorsement or delivery does not cut off the defenses of the maker or acceptor against it."

In 1 Dan. on N. I., § 724, it is said substantially that negotiable paper may be transferred by indorsement or by delivery "either before it has fallen due or afterward," and although dishonored for non-payment or non-acceptance, it is still negotiable and "passes from hand to hand *ad infinitum* until paid."

And although the direct remedy on the note may be barred by lapse of time, the debt created by it is not thereby extinguished, but still exists for the purpose of enforcing any lien or pledge given to secure its payment, and the transfer of the note after such lapse of time will carry with it this right. Hickox *v.* Elliott, 10 Saw.,
201 422; Sichel *v.* Carrillo, 42 Cal., 493; 1 Jones on Mort., § 1201; Myer *v.* Beal, 5 Or., 130.

My conclusion is: (1) These notes when transferred to the plaintiff were "negotiable according to the law merchant," and therefore he can maintain suit on them in this court without reference to the

citizenship of his assignors; (2) the transfer of the notes carried with them the mortgages to secure their payment. The latter are a mere incident of the former. The ownership of the notes gives the plaintiff the right to collect the debt of which they are evidence by a suit in this court to enforce the lien of the mortgages on the land of the surety, and (3) this suit was brought within six years from the last payment of interest on these notes, and is therefore not barred by lapse of time.

The plaintiff is entitled to a decree establishing the amount due on the notes at $36,417.08 and for the sale of the land belonging to Plumra F. Cross in her lifetime and included in the mortgage for the purpose of paying the same, and the case will be referred to a master of this court to make such sale and application of the proceeds.

Mr. George H. Williams and Mr. Henry Ach, for the plaintiff; M. William H. Holmes, for the defendants.

MATTHEW P. DEADY,
U. S. District Judge, Oregon.

Endorsed: Filed July 19, 1886. R. H. Lamson, clerk.

202 And afterwards, to wit, on the 27th day of July, 1886, there was duly filed in said court a motion for rehearing in words and figures as follows, to wit:

203 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD *et al.*, Defendants.

I feel constrained out of a sense of duty to my clients to file this their petition for a rehearing of the said cause. I do so from an earnest conviction that manifest error exists and omissions occur showing misapprehensions of the facts.

1st. The court assumes that no evidence was adduced to show an extension of time on the part of Allen & Lewis to Thomas Cross, and that the contention is that the execution of the trust deed to Mr. Lewis was tantamount to such extension. Now, the amendments to the bill of complaint allege that it was agreed by Mr. Lewis and Mr. Thomas Cross that this property should be sold at auction on the fair grounds, and that the day was fixed between them, and that some of the property was sold in pursuance of such contract. It was this agreement to sell and subsequent acts in pursuance of the agreement which I contended was a contract for extension of time, and the consideration to uphold it was the trust deed and the subsequent moneys realized on the same.

Even though nothing passed as a consideration, it is enough that they acted on the arrangement. The time was extended in fact to the agreed time of sale. It would be an unjust imputation against Mr. Lewis to say he would not keep his word when he agreed

204 that the sale at auction might take place at the time and in the manner specified. It was a valid agreement, treated and

acted on as such by the parties. This is the theory upon which the case of Looneer *vs.* Wheelwright, 3 Sanford Chancery, 171, '2, was decided; and, again, Mr. Brandt is authority for the assertion that "if the parties act upon an implied agreement for extension of time that will be sufficient." It is difficult to come to any other conclusion than that there was an extension of the time of payment under these circumstances, and it were idle to say that Mrs. Cross and her legal representatives were not bound by it. If she had been living at the time, or if her heirs had tendered the money on these mortgages pending the sale and had commenced to foreclose, she or they would be met with the answer that a new and different contract had been substituted for the old. Were it said that the contract was not legally binding the answer would be that it was binding in morals, and that no one but Mr. Lewis could be permitted to take advantage of it; she could not. The court having based its opinion concerning the matter of limitation upon the fact that the payment made by Cross kept the debt alive as to his wife, we have to say Mrs. Cross formed no debt of her own. She simply entered into a collateral contract, pledging certain of her property to the payment of her husband's debt to Allen & Lewis.

Mr. Angel on Limitations, sec. 250, says: "But it is evident that a payment made by one of several liable *alieno jurie* cannot raise an implied promise by them all, and that where the relationship of the parties to a contract is collateral and there is no *aggregatio mentium* neither can vary or affect the liability of the other. Where the maker of a promissory note of more than six years' standing died insolvent he and a guarantor of the note, it was
205 held, never were jointly liable, and the undertaking of the guarantor being independent of and collateral to that of the maker, the allowance by him as commissioner of the maker's note after his decease as a valid claim against the estate implied no promise to pay the debt. Both maker and guarantor stand equally independent to each other. If A guarantees to B the performance of any contract he may make with C and six years elapse after the contract between B and before the bringing of suit against A upon his guaranty, no acknowledgment by C subsequent to the contract can take the case out of the statute as to A. A made an engagement by himself and was in no kind of partnership.

There can be no question that a party attempted to be charged as the indorser of a negotiable note may be protected by the statute, notwithstanding the maker may have made a direct and positive promise within six years to pay the same, and it has been held expressly that where an acknowledgment was made by an accommodation acceptor within six years of his liability to the payee it was insufficient to deprive the drawer from the protection of the statute. It has been considered an extravagant extension of the general rule to make a mere payment of a sum of money to the indorsee of a note by one of two joint makers sufficient to render the other liable, as the money might have been paid on some other account. The other party must expressly acknowledge the payment on account of the note."

The learned author seems to have taken his argument from the case of Gardner *vs.* Nutting, 5 Greenleaf (Me.), 140, where the principle was squarely held. It was held by Deady, J., in Eubanks *vs.* Leveridge, 4 Sawyer, 279, that these remedies are distinct. It follows, said the judge, that the remedy upon the mortgage is
206 barred irrespective of that upon the note. The remedies are not identical nor necessarily coexistent. The same decision recites the long established doctrine that the mortgage contract is only collateral to the note which it was made to secure.

Very respectfully submitted.

W. H. HOLMES,
E. C. Cross and Frank Cross.

(Endorsed:) Filed July 27, 1886. R. H. Lamson, clerk.

207 And afterwards, to wit, on Wednesday, the 18th day of August, 1886, the same being the 58th judicial day of the regular April term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

208 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

AUGUST 18, 1886.

This cause was heard on the petition of the defendants, Edwin C. Cross and Frank Cross, for a rehearing of this cause, and was argued by Mr. George H. Williams and Mr. C. E. S. Wood, of counsel for the plaintiff, and by Mr. W. H. Holmes, of counsel for said defendants; on consideration whereof it is ordered that the decree heretofore entered in this case on July 19, 1886, stand as the decree of this court.

DEADY, *J.*

(Endorsed:) Filed Aug. 18th, 1886. R. H. Lamson, clerk.

209 And afterwards, to wit, on the 18th day of August, 1886, there was duly filed in said court an opinion by the court in words and figures as follows, to wit:

given to him. He is an original promissor, and, unless excused by the fact of time given to the creditor or the misapplication of the pledge given by the debtor, it is his duty to pay the same as if it was in fact his own debt. Therefore the law is not watchful or swift to find a loophole or technicality through which he may escape his liability; and where property is mortgaged by the owner to secure the debt of another such property occupies the position of a surety and is liable for the payment of the debt accordingly. Brandt on S. & G., §§ 21, 22; 1 Jones on Mort., § 114.

As to the statute of limitations, counsel now make the point that, as the statute commenced to run against the mortgage executed by Pluma F. Cross on January 23, 1873, the remedy thereon was barred before the commencement of this suit, on February 5, 1884. In this connection counsel cites and relies on a case decided in this court—Eubanks *v.* Leveridge, 4 Saw., 274. That was a suit on a mortgage by an assignee of the mortgagee therein against the grantee of the mortgagor. The defendant was not liable on the note which the mortgage was given to secure, but only as the successor in interest of the mortgagor in the land. The mortgagor, the maker of the note, was not a party to the suit, and the note was not regarded as being in the case. More than ten years had elapsed since the note became due, and it was conceded that the remedy on the mortgage was barred unless a certain time, during which the mortgagor was out of the State, after the right of action accrued on the note should be deducted from the limitation prescribed by the statute, as provided in § 16 of the Code of C. P., which declares, in effect, that the time during which a person is out of the State after an action accrues against him shall not be deemed or taken as a part of the limitation.

The court, following the decision in Anderson *v.* Baxter (4 Or., 107), held that a suit to enforce the lien of a mortgage being in effect a proceeding *in rem* and not "against" any "person," the qualification contained in said § 16 did not apply, for the reason that the absence of the mortgagor or debtor from the State did not prevent the prosecution of such a suit. The mere statement of the case shows it has no application to this, which is a suit on a promissory note secured by a mortgage, in which the remedy on the note is confessedly not barred by lapse of time. The time within which the suit may be brought on the note has been extended by the payment of interest thereon; and the question is, While the note is kept alive by this means can the security die?

As was said in the opinion of the court (28 Fed. Rep., 26), the mortgage or security is a mere incident of the debt and passes with it.

Therefore a transfer of a note carries with it all securities for its payment, whether a mortgage or otherwise. It is the debt that gives character to the mortgage and determines the rights and remedies of the parties to the transaction. 1 Daniel N. I., §§ 748, 834, *et seq.*

On principle, then, whatever act or fact operates to keep the note alive and prevents the statute from running against the remedy thereon ought to have the same effect on the security. The one is

the personal obligation of the party and the other is the particular thing or means set apart and pledged for its fulfillment and performance. So long as this obligation lives and a suit against the maker can be maintained thereon the security for its payment should be subject to enforcement also. Ewell *v.* Daggs, 108 U. S., 146.

But under § 25 of the Code of C. P., which declares that "whenever any payment of principal or interest" is made on "an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness," after the same becomes due "the limitation shall commence from the time the last payment was made," I am unable to see why the payments, which confessedly kept alive the remedy on the note, did not directly have the same effect on the mortgage. In addition to being an incident of the note, it is a "contract" and "evidence of indebtedness," and the payments were as much made on it as on the note. The payment was made on the debt and affected the mortgage as well as the note. It
211 extinguished so much of the latter for which the former is security, and the unsatisfied existence of the one was as much acknowledged thereby as the other. The statute expressly declares that a payment on the "contract" shall have the effect to postpone the running of the statute until from and after the date of the last payment, and in my judgment that logically and legally includes the mortgage as well as the note it was given to secure.

The argument for the defendants practically admits this proposition in case of a mortgage by the principal debtor, or even in the case of a surety by mortgage or pledge, who is also a party to the promise to pay, but denies it where the surety is not personally bound.

The rule at common law was that a payment by the principal, even after the statute had run, revived the debt against the surety as well as himself. See Sigourney *v.* Drury, 14 Pick., 387, cited in the opinion of the court. Some, if not many, of the States have changed this rule by statute, but this State has simply declared the effect of payment, "whenever" made, to be the establishment of a new point of time from which the statute shall run, divested of all the subtleties which had grown up around the subject.

The supreme court of the State, in Sutherlin *v.* Roberts (4 Or., 378), held that any person who can be compelled to pay a note is competent to make a payment thereon under said § 25. Thomas Cross was liable to pay this note, and a payment made by him thereon was a payment within that section. In that case more than ten years had elapsed since the note became due that the mortgage was made to secure. The note and mortgage were made by the defendant, Jane Roberts, and the deceased, Jesse Roberts, who was in fact her husband, though that does not distinctly appear in the report of the case, and the mortgage must have included the property of the wife as well as that of the husband. There was a payment by the administrator of the deceased out of the assets of his estate less than ten years before the commencement of the suit, so that the statute had run against the note, but not the mortgage, provided full effect was given to this payment as against the latter. The right of the

administrator to make the payment under § 25 of the code was contested on the ground that he was a volunteer; but the court held that as he could be compelled to pay the note so far as he had assets his payment with them was within the statute and constituted the point of time from which the limitation commenced. This being so, it was taken for granted by court and counsel that the payment on the debt had the same effect on the mortgage that it had on the note, and therefore the suit to enforce the lien of the mortgage was not barred.

As we have seen, Pluma F. Cross is, as to her property included in this mortgage, a surety for the payment of this debt as much as if she had signed the note given for the same. Her principal made the payments on this debt, for which in her property she was surety, and by so doing he prevented the statute from running against it before the commencement of this suit. While the remedy on the note is not barred, neither is that on the mortgage, either because it is a mere incident of the note and follows it or the payment was, under the statute, made on the mortgage as well as the note, and had the same effect on the former as the latter.

And why should the statute run against the mortgage and not against the note? They are essential parts of the same transaction. 1 Jones on Mort., § 71. The one is the complement of the other. The mortgage was given to secure the payment of the note, and presumably the creditor relied on it exclusively, and whatever act of the parties or either of them that has the effect under the law to delay the running of the statute against the promise to pay the debt ought in justice and right to include the security given for its payment. The surety executed the mortgage presumably with a knowledge of the law as to the effect of payment by the principal and must be deemed and taken to consent to it and be bound accordingly. The former ruling is adhered to.

Mr. C. E. S. Wood and Mr. George H. Williams for the plaintiff.

Mr. Wm. H. Holmes for the defendants.

MATTHEW P. DEADY,
U. S. Judge.

(Endorsed:) Filed Aug. 18, 1886. R. H. Lamson, clerk.

212 And afterwards, to wit, on the 27th day of September, 1886, there was duly filed in said court a report of master of sale and distribution in words and figures as follows, to wit:

213 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross, P. May Wilson and John Wilson, Her Husband; Frank Cross, a Minor, Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants. } No. 1056.

Master's Report of Sale and Distribution of Proceeds.

To the honorable judges of the circuit court of the United States for the district of Oregon:

In pursuance of a decree entered in the above-entitled cause on the nineteenth day of July, A. D. 1886, I, the undersigned, master in chancery of said court, respectfully report that more than ten days having elapsed after the date of said decree, and the defendants having failed to pay the amount as required by said decree within the time limited, I duly advertised according to law and the decree the premises in said decree and hereinafter described to be sold, at public auction, to the highest bidder, for cash, subject to redemption, at the hour of eleven o'clock in the forenoon on Saturday, the twenty-fifth day of September, A. D. 1886, at the court-house door of the court-house of Marion county, at Salem, in the county of Marion and State of Oregon, by causing a notice containing the title of said cause, the names of the parties thereto, the name of the court in which it was pending, and a description of the premises to be sold and a statement of the aforesaid time, place, and terms of said sale to be published for four successive weeks immediately prior to said day of sale, to wit, four times in the Oregon Statesman, a weekly newspaper of general circulation in said county, printed and published every Friday in Salem, in said county. The date of the first paper containing such notice was the twentieth day of August, A. D. 1886, and the date of the last paper containing the same was the seventeenth day of September, A. D. 1886; and also by posting four weeks prior to said day of sale printed copies of said notice in three of the most conspicuous places in said county, a printed copy of which said notice so published and posted is hereto attached, marked Exhibit "A," and made a part of this report; that at the time and place so designated for said sale I attended to make the same and offered and exposed said premises for sale, at public auction, to the highest bidder, subject to redemption, and offered separately the parcels hereinafter described.

administrator to make the payment under § 25 of the code was contested on the ground that he was a volunteer; but the court held that as he could be compelled to pay the note so far as he had assets his payment with them was within the statute and constituted the point of time from which the limitation commenced. This being so, it was taken for granted by court and counsel that the payment on the debt had the same effect on the mortgage that it had on the note, and therefore the suit to enforce the lien of the mortgage was not barred.

As we have seen, Pluma F. Cross is, as to her property included in this mortgage, a surety for the payment of this debt as much as if she had signed the note given for the same. Her principal made the payments on this debt, for which in her property she was surety, and by so doing he prevented the statute from running against it before the commencement of this suit. While the remedy on the note is not barred, neither is that on the mortgage, either because it is a mere incident of the note and follows it or the payment was, under the statute, made on the mortgage as well as the note, and had the same effect on the former as the latter.

And why should the statute run against the mortgage and not against the note? They are essential parts of the same transaction. 1 Jones on Mort., § 71. The one is the complement of the other. The mortgage was given to secure the payment of the note, and presumably the creditor relied on it exclusively, and whatever act of the parties or either of them that has the effect under the law to delay the running of the statute against the promise to pay the debt ought in justice and right to include the security given for its payment. The surety executed the mortgage presumably with a knowledge of the law as to the effect of payment by the principal and must be deemed and taken to consent to it and be bound accordingly. The former ruling is adhered to.

Mr. C. E. S. Wood and Mr. George H. Williams for the plaintiff.

Mr. Wm. H. Holmes for the defendants.

MATTHEW P. DEADY,
U. S. Judge.

(Endorsed:) Filed Aug. 18, 1886. R. H. Lamson, clerk.

212 And afterwards, to wit, on the 27th day of September, 1886, there was duly filed in said court a report of master of sale and distribution in words and figures as follows, to wit:

213 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross, P. May Wilson and John Wilson, Her Husband; Frank Cross, a Minor, Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants. } No. 1056.

Master's Report of Sale and Distribution of Proceeds.

To the honorable judges of the circuit court of the United States for the district of Oregon:

In pursuance of a decree entered in the above-entitled cause on the nineteenth day of July, A. D. 1886, I, the undersigned, master in chancery of said court, respectfully report that more than ten days having elapsed after the date of said decree, and the defendants having failed to pay the amount as required by said decree within the time limited, I duly advertised according to law and the decree the premises in said decree and hereinafter described to be sold, at public auction, to the highest bidder, for cash, subject to redemption, at the hour of eleven o'clock in the forenoon on Saturday, the twenty-fifth day of September, A. D. 1886, at the court-house door of the court-house of Marion county, at Salem, in the county of Marion and State of Oregon, by causing a notice containing the title of said cause, the names of the parties thereto, the name of the court in which it was pending, and a description of the premises to be sold and a statement of the aforesaid time, place, and terms of said sale to be published for four successive weeks immediately prior to said day of sale, to wit, four times in the Oregon Statesman, a weekly newspaper of general circulation in said county, printed and published every Friday in Salem, in said county. The date of the first paper containing such notice was the twentieth day of August, A. D. 1886, and the date of the last paper containing the same was the seventeenth day of September, A. D. 1886; and also by posting four weeks prior to said day of sale printed copies of said notice in three of the most conspicuous places in said county, a printed copy of which said notice so published and posted is hereto attached, marked Exhibit "A," and made a part of this report; that at the time and place so designated for said sale I attended to make the same and offered and exposed said premises for sale, at public auction, to the highest bidder, subject to redemption, and offered separately the parcels hereinafter described.

Whereupon C. H. Lewis offered and bid therefor the sum of fifty dollars per acre for the eighty-acre tract and sixty dollars per acre for the one hundred and thirty-one acre tract, and, that being the highest bid offered therefor, I accordingly struck off and sold, subject to redemption, to said bidder for said sum of money the said premises, which are situated in the county of Marion and State of Oregon and described as follows, to wit: All the right, title, and interest that said Thomas Cross and Pluma F. Cross had on the
214 first day of November, 1871, in and to the following-described premises, to wit: A part of the donation land claim of David Leslie and wife, situate in township seven south of range three west of the Willamette meridian, known as claim numbered forty-five, commencing at a point in the south boundary line of said claim six chains and twenty-five links south eighty-nine degrees and thirty minutes west from the southeast corner of said claim, running thence north one degree east parallel to the east line of said claim eight chains and five links; thence east ten chains and eighty-three links (the last four chains and fifty-eight links of this line being along the south line of said land claim); thence north thirty minutes east seventeen chains and six links; thence west thirty-five chains and seven links; thence south two degrees and thirty minutes west twenty-five chains and thirty links to the south line of the claim; thence north eighty-nine degrees and thirty minutes east along the south line of the claim twenty-five chains and twenty-seven links to the place of beginning, containing eighty acres, more or less.

Also the donation land claim of F. S. Hoyt and wife, the same being notification numbered sixty-nine and claim numbered fifty-three, in township seven south of range three west, containing one hundred and thirty-one acres, more or less, together with all the tenements, hereditaments, and appurtenances thereunto belonging.

215 The amount realized from the sale of said *sale* was in the aggregate the sum of eleven thousand eight hundred and sixty dollars.

I have distributed the proceeds of said sale in the manner following, to wit:

I have paid to the Oregon Statesman the sum of twenty-five dollars. I have paid to L. H. Allen, complainant, the sum of eleven thousand five hundred and eighty-three dollars, and they have executed to me their receipts for said sums, which receipts are herewith returned and marked "Exhibit B."

I have retained the sum of two hundred and fifty-two dollars, the amount of my fees, commissions, and disbursements herein. The schedule hereinafter contained shows more particularly the distribution of the proceeds of said sale.

In conclusion I report that the moneys arising from said sale were not sufficient to pay the amount found due the complainant, with the interests and costs and expenses of sale, and that the amount of deficit was — dollars.

Schedule.

To am't of purchase price	$4,000 00	By cost of advertising,	$25 00
	7,860 00	master's commission	252 00
		Am't paid complainant	11,583 00
	$11,860 00		$11,860 00

All of which is respectfully submitted.
Dated twenty-seventh day of September, A. D. 1886.

WM. B. GILBERT,
Master in Chancery of the Circuit Court of the United States for the District of Oregon.

EXHIBIT "A."

Master's Sale.

In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; Edwin C. Cross, P. May Wilson and John Wilson, Her Husband; Frank Cross, a Minor, Sued Herein by Edwin C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

Notice is hereby given that in pursuance of a decree of said court made and entered in the above-entitled cause on the nineteenth day of July, 1886, I, William B. Gilbert, master in chancery of said court, will proceed to sell at public auction to the highest bidder, for cash in hand, subject to redemption, at the front door of the court-house of Marion county, at Salem, in Marion county, State of Oregon, on Saturday, the twenty-fifth day of September, 1886, at the hour of eleven o'clock in the forenoon, all the right, title, and interest that said Thomas Cross and Pluma F. Cross had on the first day of November, A. D. 1871, in and to the following-described premises, to wit: A part of the donation land claim of David Leslie and wife, situate in township seven south of range three west of the Willamette meridian, known as claim numbered forty-five: Commencing at a point in the south boundary line of said claim six chains and twenty-five links south eighty-nine degrees and thirty minutes west from the southeast corner of said claim, running

thence north one degree east parallel to the east line of said claim eight chains and five links; thence east ten chains and eighty-three links (the last four chains and fifty-eight links of this line being along the south line of said claim); thence north thirty minutes east seventeen chains and six links; thence west thirty-five chains and seven links; thence south two degrees and thirty minutes west twenty-five chains and thirty links to the south line of the claim; thence north eighty-nine degrees and thirty minutes east along the south line of the claim twenty-five chains and twenty-seven links to the place of beginning, containing eighty acres, more or less; also the donation land claim of F. S. Hoyt and wife, being notification No. sixty-nine, and claim No. fifty-three, in township seven south of range three west, containing one hundred and thirty-one acres, together with all the tenements, hereditaments, and appurtenances thereto belonging.

Dated August 18th, 1886.

WILLIAM B. GILBERT,
Master in Chancery of the Circuit Court of the United States for the District of Oregon.

216 EXHIBIT "B."

In the U. S. Circuit Court, District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD *et al.* } In Chancery.

Receipt of the Oregon Statesman.

SALEM, OREGON, *September* 25, 1886.

Received from W. B. Gilbert, master in chancery of the circuit court of the United States, dist. of Oregon, the sum of twenty-five dollars, cost of advertising notice of sale in case of L. H. Allen *vs.* Eliza O'Donald *et al.*

R. J. HENDRICKS,
Manager Oregon Statesman.

Receipt of L. H. Allen, Complainant.

Received this twenty-seventh day of September, A. D. 1886, of William B. Gilbert, master in chancery of said court, by whom the property described in the decree entered in the above-entitled cause on the nineteenth day of July, A. D. 1886, was sold at master's sale on the twenty-fifth day of September, A. D. 1886, the sum of eleven thousand five hundred and eighty-three dollars ($11,583.00).

WILLIAMS, ACH & WOOD,
Att'ys for Complainant.

217 WM. B. GILBERT,
Master in Chancery.

[Endorsed:] No. 1056. In the circuit court of the United States

for the district of Oregon. L. H. Allen, complainant, *vs.* Eliza O'Donald *et al.*, defendants. Master's report of sale and distribution. (Endorsed:) Filed Sept. 27, 1886. R. H. Lamson, clerk.

218 And afterwards, to wit, on Monday, the 18th day of October, 1886, the same being the 10th judicial day of the regular October term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

219 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN
vs.
ELIZA O'DONALD *et al.* } No. 1056.

OCTOBER 18, 1886.

Now, at this day, comes the plaintiff in the above-entitled cause, by Mr. C. E. S. Wood, of counsel, and this cause comes on to be heard upon the report of Mr. William B. Gilbert, one of the masters of this court, of the sale of the real property described in the decree herein and of the distribution of the proceeds thereof by him made pursuant to the decree entered in this cause on September twenty-fifth, eighteen hundred and eighty-six, and it appearing to the court that said report was filed herein on September twenty-seventh, eighteen hundred and eighty-six, and that no objections or exceptions have been filed thereto, and it further appearing to the court that the proceedings of said master and the sale by him made of the real property in the bill mentioned are in accordance with the decree entered herein as aforesaid, it is adjudged and decreed that the said proceedings and sale by said master be, and they are hereby, in all things confirmed, and that on the expiration of the period allowed for redemption the said master do execute to the purchaser at said sale or to his assignee a conveyance of the real property aforesaid, conveying all the right, title, and interest which the defendants, Thomas Cross and Pluma F. Cross, or either of them, had in said premises on November first, eighteen hundred and seventy-one, the date of the mortgage set out in the bill herein, and that the defendants who may be in the possession of said premises or any part thereof or any person who has come in under them or either of them pending this suit do deliver up the possession thereof to
220 said purchaser or to his assignee on demand and the production of said master's said deed, and that in default thereof a writ of possession issue upon the application of said purchaser or of his assignee.

(Signed) DEADY, *J.*

(Endorsed:) Filed Oct. 18, 1886. R. H. Lamson, clerk.

221 And afterwards, to wit, on the 22nd day of August, 1887, there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

222 Supreme Court of the United States.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD & JONATHAN O'DONALD, Her Husband; WM. F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Frances Cross, His Wife; E. C. Cross; P. Mae Wilson and John Wilson, Her Husband; Frank R. Cross, a Minor, Sued Herein by E. C. Cross, His Guardian *ad Litem*, Heirs-at-Law of Thomas Cross & Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased; John G. Wright & E. C. Cross, Administrators of the Estate of Thomas Cross, Dec'd, & C. H. Lewis, Defendants.

Know all men by these presents that we, E. C. Cross and Frank R. Cross, a minor, by E. C. Cross, his guardian *ad litem*; J. A. Huffman, and John G. Wright, all of Salem, Marion county, State of Oregon, are held and firmly bound unto L. H. Allen, his executors or administrators (the said L. H. Allen being the complainant above named and a citizen and resident of the city of San Francisco, State of California), in the sum of five hundred dollars, to be paid to the said L. H. Allen, his executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 1st day of August, A. D. 1887.

Whereas the above-named defendants, E. C. Cross and Frank R. Cross, a minor, by E. C. Cross, his guardian *ad litem*, have
223 prosecuted an appeal for error in the Supreme Court of the United States to reverse the judgment and decree rendered in the above-entitled suit by the circuit court of the United States for the district of Oregon: Now, therefore, the consideration of this obligation is such that if the above-named E. C. Cross and Frank R. Cross shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

E. C. CROSS. [SEAL.]
FRANK R. CROSS, [SEAL.]
By E. C. CROSS,
His Guardian.
J. A. HUFFMAN. [SEAL.]
JOHN G. WRIGHT. [SEAL.]

Sealed and delivered in presence of—

BEN. HAYDEN.
W. H. HOLMES.

STATE OF OREGON, } ss:
District of Oregon, County of Marion, }

We, J. A. Huffman and John G. Wright, of Salem, Oregon, sureties upon the foregoing obligation, being severally and duly sworn, say and each for himself says that I am a resident of Salem, Marion county, in the State of Oregon, and a freeholder of said county & State, and am worth the sum of five hundred dollars over and above all my just debts and liabilities and exclusive of property exempt from execution.

J. A. HUFFMAN.
JOHN G. WRIGHT.

Subscribed and sworn to before me this 2nd day of August, A. D. 1887.

[SEAL.] B. N. HAYDEN,
Notary Public.

Approved:
DEADY, *J.*

Endorsed: Filed Aug. 22, 1887. R. H. Lamson, clerk.

224 And afterwards, to wit, on the 22nd day of August, 1886, there was duly filed in said court an assignment of errors in words and figures as follows, to wit:

225 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD, EDWIN C. CROSS, and FRANK R. CROSS, a Minor, by Edwin C. Cross, His Guardian *ad Litem, et al.*, Defendants.

The defendants, Edwin C. Cross and Frank R. Cross, a minor, by Edwin C. Cross, his guardian, being about to remove the above-entitled cause by appeal on error to the Supreme Court of the United States, hereby make the following assignment of errors and pray a reversal of said judgment and decree in said cause rendered on account of such errors, this assignment of errors being in pursuance of sec. 997 of the Revised Statutes of the United States and of the Rules of the Supreme Court of the United States.

Assignment of Errors on Appeal.

First. The court erred in holding that the foundation of the suit in this cause, so far as the appellants are concerned, was the notes mentioned in the complaint and not the mortgages therein mentioned.

2nd. The court erred in holding that payments on the said notes

by Thomas Cross, the father of the appellants, prevented the operation of the statute of limitations as to their deceased mother, for whose property they defend.

3rd. The court erred in holding that the suit herein was not barred by the statute of limitations, so far as the property in controversy is concerned.

4th. The court erred in holding that the lien of the respond-
226 ent on the land in controversy was not lost by the laches of the said respondent and his grantor.

5th. The court erred in holding that the transfer of the interest of C. H. Lewis to his partner, the respondent, was *bona fide* and made for the purpose of trying the cause in the Federal court.

6th. The court erred in holding the notes mentioned in the complaint to be negotiable, according to the law merchant, within the meaning of the act of Congress of March, A. D. 1875.

7th. The court erred in holding that it had jurisdiction of the subject-matter of the suit and the parties thereto also.

8th. The court erred in holding that the sale of portions of the lands of Thomas Cross included in said mortgages, at public auction, without foreclosure, and at private sale, by said Thomas Cross and C. H. Lewis, and the release of the mortgage liens on the same, did not work a change of the contract by which the surety became bound, and that the surety was not thereby discharged or her lands released from the lien of said mortgages.

9th. The court erred in holding that the contract entered into between the respondent and C. H. Lewis, on the one part, and Thomas Cross, deceased, on the other part, whereby certain of the lands of the said Thomas embraced in the said mortgages were advertised for sale at the State fair grounds at a time certain, and the execution of the trust deed in pursuance thereof, and the actual sale of said lands under said contract and in accordance therewith, did not imply an extension of time, and that the lands of the surety were not thereby discharged.

W. H. HOLMES AND
JOHN H. MITCHELL,
Solicitors for said Defendants, Appellants Herein.

Endorsed: Filed Aug. 22, 1887. R. H. Lamson, clerk.

227 In the Circuit Court of the United States for the District of Oregon. In Equity.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, P. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor; Heirs-at-Law of Thomas Cross and Pluma F. Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, Deceased, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

228 Deposition of C. H. LEWIS, a witness produced, sworn, and examined on behalf of the defendants, Edwin C. Cross and Frank Cross, at the city of Portland, in said district of Oregon, on the 2nd day of April, A. D. 1886, before me, J. B. Thompson, a notary public in and for the county of Multnomah, State of Oregon, duly commissioned and sworn and residing in the city of Portland aforesaid.

The complainant appearing by Henry Ach, Esq., his counsel, and the defendants, Edwin C. Cross and Frank Cross, appearing by their counsel, William H. Holmes.

And said parties consenting that said testimony of said witness should be so taken upon oral interrogations propounded to him, the said witness, having been by me first duly cautioned and sworn to testify the whole truth, in answer to the following questions did depose and say as follows:

Direct examination by Mr. W. H. HOLMES:

1 Quest. Are you the C. H. Lewis impleaded with the other defendants herein?

Ans. I suppose I am.

2 Quest. Does the partnership relations between you and L. H. Allen, the plaintiff herein, exist as heretofore?

(Objected to as irrelevant and immaterial.)

Ans. They do not.

3 Quest. Are you pecuniarily interested in the result of this litigation?

(Objected to as irrelevant and immaterial.)

Ans. The indebtedness of Mr. Cross to Allen & Lewis was transferred to Mr. Allen some time ago, and my interest in the claim pecuniarily ceased at the time.

229 4 Quest. Did you render Mr. Allen *with* a statement of the account charging him with the amount of this indebtedness?

Ans. I did.

5 Quest. How much did you receive for your interest?

(Same objection as last above.)

—. I did not receive anything. I charged it to him against his interest in the business.

6 Quest. How much did you charge him with and when?

(Same objection as last above.)

—. I cannot tell you the exact date, but it was before this suit was commenced. The amount was forty thousand dollars.

7 Quest. When the land or portions thereof were sold by the receiver you became the purchaser individually, did you not?

(Objected to as last above.)

Ans. Yes; some of them.

8 Quest. Did you make this transfer to your partner, Gen'l Allen, in pursuance of a contract you had with him, or did he leave the matter to your guidance or discretion?

(Objected to as irrelevant, incompetent, and immaterial.)

Ans. He fully understood the matter, and it was done with an understanding with him.

9 Quest. What was the purpose and object of making the transfer?

(Objected to as last above.)

230 —. The principal object was to get the matter settled between us.

10 Quest. Who employed the firm of Fechheimer & Ach to foreclose the mortgage?

(Objected to as last above.)

Ans. I employed Mr. Fecheimer in the case, with the full consent and understanding with Mr. Allen.

11 Quest. Did you so employ him before or after you transferred your interest to Mr. Allen?

(Objected to as last above.)

Ans. He was employed before and after the transfer and had charge of the case for at least ten years, and that, too, with an understanding with Mr. Cross.

12 Quest. Is it not a fact that one of the purposes of the transfer of the notes and mortgages in suit to Gen'l Allen, he being a citizen of California, was to make a case that could be tried in United States court?

(Objected to as last above, because the witness has already stated how the transfer was made and for what purpose.)

Ans. Well, we had that object in view at the time the transfer was made.

13 Quest. Are you familiar, Mr. Lewis, with the pleadings in this case?

Ans. I am not.

14 Quest. Have you consulted with counsel for pl'ff and furnished them with data from which the pleadings were drawn?

Ans. Yes.

231 15 Quest. Are you familiar with the circumstances of sale or sales of lands included in the original mortgages, as set out in the amendments to the bill of complaint filed herein?

Ans. I know that there were some lands sold. Before those lands were sold they were surveyed and platted at the request of Mr. Cross. It was understood at the time the land was platted that all of that tract should be sold. Further sales were stopped at the request of Mr. Cross, as they would not bring satisfactory prices.

16 Quest. You were interested in the mortgages at that time?

Ans. I was.

17 Quest. And consummated this arrangement with Mr. Cross whereby those lands were sold, as stated in the amendments to the bill?

(Objected to as incompetent.)

Ans. Yes.

18 Quest. By Mr. Cross you mean Thomas Cross, now deceased?

Ans. Yes.

19 Quest. Do you remember, Mr. Lewis, at whose suggestion it was that portions of those lands were offered at public sale on the fair grounds at Salem?

(Objected to as immaterial.)

Ans. It was at my urgent request for payment of the loan, and that plan was adopted after full consideration between us.

20 Quest. Did you agree with Mr. Cross as to the time and manner of advertising the lands so proposed to be sold?

(Objected to as immaterial and incompetent.)

Ans. My impression is that he fixed the time and advertisements.

21 Quest. And you consented to his terms?

232 (Objected to as incompetent and immaterial.)

Ans. I did; at least, made no objection.

22 Quest. By time do you mean the time of sale?

(Objected to as immaterial & incompetent.)

Ans. I do.

Cross-examination by Mr. ACH:

Quest. These mortgages were assigned to Mr. Allen, were they not?

Ans. They were.

Quest. State whether or not the transfer and assignment to Mr. Allen was not without reserve and *bone fide* and without collusion.

Ans. It was.

Quest. When you state that sueing in the Federal court was in

view, state whether or not that was not simply regarded as an advantage to Mr. Allen and was not the closing out of the claim against Cross the real object and purpose of the transfer?

Ans. That was the only object. So far as carrying it into the Federal court was concerned, that arrangement was made between Mr. Allen & Mr. Fechheimer.

Redirect:

Quest. Mr. Lewis, will you please read direct question No. 12 and your answer thereto and state whether that answer is true or not?

(The witness here reads the question and answer.)

Objection as immaterial and not proper redirect examination.

Ans. 'Tis true.

C. H. LEWIS.

233 UNITED STATES OF AMERICA, } ss:
District of Oregon, }

This is to certify that on the 2nd day of April, A. D. 1886, at the hour of ten o'clock in the forenoon, at my office, room 2, First National Bank building, in the city of Portland, in said district, before me, the undersigned, a notary public in and for the county of Multnomah, State of Oregon, personally came and appeared the above-named C. H. Lewis, who, having been by me first duly cautioned and sworn to testify the whole truth in the foregoing-entitled suit of L. H. Allen *vs.* Eliza O'Donald *et al.*, was examined by counsel for the parties to said suit upon oral interrogations then and there propounded to said witness; that said interrogations and the answers thereto, as hereinbefore set forth, were by me then and there in the presence of said witness and in the presence of said counsel for the respective parties caused to be reduced to writing; that after said questions and the answers thereto were so reduced to writing they were carefully read over to said witness, who thereupon and on the same day and at the place aforesaid in my presence and in the presence of the counsel for the respective parties subscribed and signed the said deposition.

I further certify that I am not of counsel or attorney to either of the parties nor interested in the event of said cause.

In witness whereof I have hereunto set my and notarial seal, at said city of Portland, in said district, this second day of April, A. D. 1886.

J. B. THOMPSON,
Notary Public for Oregon.

[SEAL.]

(Endorsed:) Filed Apr. 6, 1886. R. H. Lamson, clerk.

234 In the Circuit Court of the United States for the District of Oregon.

L. H. ALLEN, Complainant,
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, Her Husband; William F. Cross and Christina Cross, His Wife; Caroline M. Wright and John G. Wright, Her Husband; James Cross and Francis E. Cross, His Wife; Edwin C. Cross, V. May Wilson and John T. Wilson, Her Husband; Frank Cross, a Minor, Heirs-at-Law of Thomas Cross and Pluma Cross, Both Deceased; Adelia Cross, Widow of Thomas Cross, and John G. Wright and Edwin C. Cross, Administrators of the Estate of Thomas Cross, Deceased, and C. H. Lewis, Defendants.

No. 1056. In Equity. *Subpœna ad Respondendum.*

The President of the United States of America to the above-named defendants, Greeting:

You and each of you are hereby commanded that you be and appear in said circuit court of the United States, at the court-room thereof, in the city of Portland, in said district, on the first Monday of September next, which will be the — day of September, A. D. 1884, to answer the exigency of a bill of complaint exhibited and filed against you in our said court, wherein L. H. Allen is complainant and you are defendants, and further to do and receive what our said circuit court shall consider in this behalf; and this you are in nowise to omit under the pains and penalties of what may befall thereon.

And this is to command you, the marshal of said district, or your deputy to make due service of this our writ of subpœna, and to have then and there the same.

Hereof fail not.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Portland, in said district, this 7th day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

Seal of U. S. Circuit Court.

(Signed) R. H. LAMSON, *Clerk*,
By G. G. GAMMONS,
Deputy Clerk.

MEMORANDUM.—Pursuant to equity rule No. 12 of the Supreme Court of the United States, the defendant is to enter his appearance in the above-entitled suit in the office of the clerk of said court on or before the day at which the above writ is returnable; otherwise the complainant's bill therein may be taken *pro confesso*.

(Endorsed:) Filed Sept. 15th, 1884. R. H. Lamson, clerk.

[Endorsed:] No. —. In the circuit court of the United States for the district of Oregon. In equity. —— —— *vs.* —— ——. *Subpœna ad respondendum.* Returned and filed ——, 188–. —— ——, clerk, by —— ——, deputy clerk.

235 UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I, R. H. Lamson, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing copy of *subpœna ad respondendum* in the case of L. H. Allen *vs.* Eliza O'Donald *et al.* issued from my office has been by me compared with the original, and that it is a correct transcript therefrom and of the whole of such original.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 14th day of August, A. D. 1884.

R. H. LAMSON, *Clerk,* [SEAL.]
By G. G. GAMMONS, *Deputy Clerk.*

236 UNITED STATES OF AMERICA, } *ss:*
Northern District of Illinois, }

I certify that on the 30th day of August, 1884, at Earlsville, in the county of Lasall, in said district, I duly served the within writ of *subpœna ad respondendum* upon the therein-named defendants, P. May Wilson and John T. Wilson, her husband, by delivering to each of them personally a copy of said writ duly certified to by me, the clerk of the U. S. circuit court for the district of Oregon.

A. M. JONES, *U. S. Marshal,*
By R. D. SHERMAN, *Deputy.*

Fees, 9.00.

237 UNITED STATES OF AMERICA, } *ss:*
District of Oregon, }

I, R. H. Lamson, clerk of the circuit court of the United States for the district of Oregon, do hereby certify that the foregoing is a true copy of the records and of all proceedings, including the opinions of the court, in the cause in equity entitled L. H. Allen, complainant, *vs.* Eliza O'Donald, Edwin C. Cross, and Frank R. Cross *et al.*, defendants, in said circuit court determined.

Seal United States Circuit Court, Oregon.

In testimony whereof I have hereunto subscribed my name and affixed the seal of said circuit court, at Portland, in said district, this fourth day of October, 1887.

R. H. LAMSON, *Clerk,*
By R. B. LAMSON, *Deputy Clerk.*

Endorsed on cover: Oregon C. C. U. S. No. 234. E. C. Cross and Frank R. Cross, a minor, by his guardian *ad litem*, E. C. Cross, appellants, *vs.* L. H. Allen. Filed October 14, 1887.

Office Supreme Court U. S.
FILED,
OCT 10 1891
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

October Term, 1891.

No. 23.

E. C. CROSS and FRANK R. CROSS, a Minor, by his Guardian *ad litem*, E. C. CROSS, Appellants,

vs.

LUCIUS H. ALLEN.

Appeal from the Circuit Court of the United States for the District of Oregon.

BRIEF AND ARGUMENT

OF

JOHN H. MITCHELL,

On part of Appellants.

PRESS OF McGILL & WALLACE,
WASHINGTON, D. C.

Supreme Court of the United States.

OCTOBER TERM, 1891.

E. C. CROSS AND FRANK R. CROSS, a minor, by his guardian *ad litem*, E. C. CROSS, Appellants,

vs.

L. H. ALLEN.

Appeal from the Circuit Court of the United States for the District of Oregon.

STATEMENT OF CASE.

This cause is here on appeal from a decree of the Circuit Court of the United States for the District of Oregon. The cause was tried before the district judge of said district sitting alone.

It is a suit in equity brought by L. H. Allen, a citizen of the State of California, to enforce the lien of two mortgages executed by Thomas Cross and Pluma F. Cross, his wife, of Salem, Oregon, to secure the payment of two promissory notes made by said Thomas Cross, alone; the one on November 1, 1871, payable to the order of the firm of Allen & Lewis, a firm doing business in Portland, Oregon, and of which L. H. Allen, appellee, was then senior member, for the sum of $30,000, payable in three years after date with interest at ten per centum per annum, and the other on January 23, 1872, to the

same firm or order, for the sum of $10,000, payable one year from that date with interest at twelve per centum per annum. The mortgages were also made to said firm of Allen & Lewis, and each was executed contemporaneously with the note it was intended to secure. The first mortgage includes fifteen separate parcels of agricultural land situate in Marion County, Oregon, numbered respectively from "one" to "fifteen," and containing in the aggregate $3{,}361\frac{54}{100}$ acres, and the second one includes the same property and in addition the south half of block 30, and certain parts of lots 1, 2, and 3 in block 20, in the city of Salem in said county and State.

The two parcels numbered "*fourteen*" and "*fifteen*" were the separate property of Pluma F., the wife of said Thomas Cross, and consist of eighty acres, being part of the donation land claim of David Leslie, and 131 acres being the donation land claim of F. S. Hoyt and wife. (Complaint Record 3–9, inclusive.)

On September 16, 1872, Pluma F., wife of Thomas Cross, died. Various parties, the children of Thomas Cross by a former marriage, and their husbands and wives, also Mr. C. H. Lewis, of the said firm of Allen & Lewis, and the appellants in this case were made parties defendant. The appellants, E. C. and Frank R. Cross, are children of said Thomas Cross and Pluma F. Cross, his wife.

Pluma F. Cross having died on September 16, 1872, on January 22, 1876, the notes being still unpaid, but long overdue, Thomas Cross and his *then* wife, C. M. Cross, he having remarried, conveyed the premises covered by the two mortgages to Mr. C. H. Lewis, a citizen of Portland, Oregon, one of the members of the firm of Allen & Lewis, to whom the notes and mortgages were originally given. The conveyance to C. H. Lewis, although abso-

lute on its face and subject to said mortgages, was, as averred in complaint and admitted by stipulation hereinafter referred to, with the specific understanding and admitted trust, that Lewis would, at the cost and expense of the said property, keep the same in cultivation, or lease or let the same or any part thereof, sell and dispose of the crops and collect the rents and apply the same when collected, after deducting all necessary and proper charges and expenses in and about the care, custody, management, and control of said premises, upon said mortgage debts; and further, that he, said C. H. Lewis, might at any time, with the consent of Thomas Cross, sell and dispose of the whole or any portion of said land, either at *public* or *private* sale, and apply the net proceeds thereof, after deducting all necessary and proper costs, expenses, and charges, on said debts. (Complaint Record 8, and Stipulation Record, 76.)

On February 5, 1884, Thomas Cross died (Complaint Record 6). On July 8, 1884, said claims were presented to and rejected by the administrators of said Thomas Cross, and soon thereafter the said notes and mortgages were indorsed and assigned by the said Allen & Lewis to Mr. L. H. Allen, of San Rafael, State of California, the plaintiff in the case, who was also a member of said firm of Allen & Lewis, and then a citizen of the State of California; and on the 6th of August, 1884, he commenced this suit in the Circuit Court of the United States for the District of Oregon. (Record, 6, 7, 10.) On January 20, 1885, an order was made that the bill be taken as confessed against all the defendants except Edwin C. Cross and Frank R. Cross, the children and heirs of Pluma F., who, on March 10, 1885, interposed a joint answer, the latter being a minor, by the former as his guardian.

The following is the complaint in full, together with amendments thereto, subsequently made under the direction of the court (Record, 2–9):

BILL OF COMPLAINT.

"IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

L. H. ALLEN, Complainant,
against
ELIZA O'DONALD and JONATHAN O'DONALD, her husband; William T. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Francis E Cross, his wife; Edwin C. Cross, P. May Wilson, and John T. Wilson, her husband; Frank Cross, a minor, heirs at law of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross, and John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, Defendants.

To the Honorable, the Judges of the Circuit Court of the United States for the District of Oregon:

Humbly complaining unto your honors, your orator, L. H. Allen, respectfully shows and avers:

That at all the dates and times herein mentioned your orator has been, and still is, a citizen of the State of California.

That at all times hereinafter mentioned and up to the time of their decease Thomas Cross and Pluma F. Cross were citizens of the State of Oregon.

That Elizabeth O'Donald and Jonathan O'Donald are husband and wife and are citizens of the State of Oregon.

That William T. Cross and Christina Cross are husband and wife and are citizens of the State of Oregon.

That Caroline M. Wright and John G. Wright are husband and wife and are citizens of the State of Oregon.

That James Cross and Francis E. Cross are husband and wife and are citizens of the State of Oregon.

That P. May Wilson and John T. Wilson are husband and wife and are citizens of the State of Illinois.

That Edwin C. Cross and Frank Cross and Adelia Cross are each of them citizens of the State of Oregon; that Adelia Cross is the widow of Thomas Cross, deceased, and said Frank Cross is a minor, under the age of eighteen years.

That all of said persons above named, save and except the widow, Adelia Cross, are heirs-at-law of Thomas Cross and Pluma F. Cross, both now deceased.

That John G. Wright and Edwin C. Cross are citizens of the State of Oregon, and are the duly appointed, qualified, and acting administrators of the estate of said Thomas Cross, deceased.

That the defendant, C. H. Lewis, is and at all times herein mentioned was, a citizen of the State of Oregon; that at all times hereinafter mentioned your orator, L. H. Allen, and the defendant, C. H. Lewis, were co-partners together, doing business under the firm name of Allen & Lewis; that on November 1, 1871, Thomas Cross and Pluma F. Cross were husband and wife.

That on said November 1, 1871, the said Thomas Cross, for value received, made, executed, and delivered to said firm of Allen & Lewis his, said Cross', certain promissory note, in which and whereby he promised to pay to the order of Allen & Lewis in three years after said date last named, the sum of thirty thousand ($30,000) dollars in United States gold coin, with interest thereon, payable semi-annually, at the rate of ten per cent. per annum, from the date of said note.

That thereupon, on said November 1, 1871, the said Thomas Cross and Pluma F. Cross, his wife, in order to secure the payment of said promissory note and interest, did duly make, sign, seal, stamp, acknowledge, and deliver to said Allen & Lewis their certain deed of mortgage, in which and whereby they did mortgage to the said Allen & Lewis, their heirs, executors, administrators, and assigns, all of the following-described real property, all being,

lying, and situate in the county of Marion, State of Oregon, to wit:

First. The donation land claim of Jeremiah Stevenson, being parts of sections numbered 21 and 22, in township 6 S., range 3 W., of the Willamette meridian, known in the land office as claim No. 65, notification No. 549, containing three hundred and twenty acres, more or less.

Second. The donation land claim of Albert Kendall and wife, being the N. E. $\frac{1}{4}$ of section 22, the N. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 22, the S. W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of section 22, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 22, in T. 6 S., R. 3 W., known in the land office as the claim embraced in certificate No. 517, notification No. 7,337, containing three hundred and twenty acres.

Third. A part of the donation land claim of William Canough and wife in township 6 S., R. 3 W., known at the land office as claim No. 64, notification 552, and the part mortgaged being described as commencing 26.44 chains south and 25.50 chains west of the N. E. corner of section 16 in said township; thence S. 89° N. E., 21.81 chains; thence S. 0° 30″ W., 20 chains; thence S. 89° 17″ E. 20 chains; thence S. 0° 30′ W., 20.45 chains; thence S. 77° 30′ W., 44.81 chains; thence N. 20 E., 51.50 chains to the place of beginning, containing one hundred and fifty-seven and $\frac{30}{100}$ acres.

Fourth. A part of the donation land claim of Alvis Smith and wife in T. 6 S., R. 3 W., known at the land office as claim No. 69, notification No. 406, commencing at a stake on the line between the Alvis Smith and the Albert Kendall claims on the north side of the lake; thence west 52 chains to a stake; thence south two rods to the lake; thence by the bank or meanderings of the lake to the place of beginning, being all said Smith claim between said lines and the lake and Kendall claim, containing twenty-three and $\frac{10}{100}$ acres, more or less.

Fifth. In section 16, T. 6 S., R., 3 W., tracts 3, 4, and 9, containing sixty-eight and $\frac{45}{100}$ acres, more or less.

Sixth. Indemnity school lands in section 21, T. 6 S., R. 3 W., tracts 6, 8, 9, and 10, containing seventy-four and $\frac{36}{100}$ acres of land, more or less.

Seventh. Indemnity school lands in section 22, T. 6 S., R. 3 N., tracts 1, 2, 3, 4, and 5, and the S. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, containing one hundred and forty-eight and $\frac{28}{100}$ acres, more or less.

Eighth. A part of the donation land claim of Alexander Spong and his wife, the mortgaged property being described as situate in section 21, T. 6 S., R. 3 W., and is bounded and described as follows: Commencing in the west line of the donation land claim of Aaron Purdy four chains north from where said west line intersects the south line of said section 21; thence N. 72° 30″ W. 15.10 to the east bank of the Willamette River; thence down the said east bank of said river, with the meanders thereof, to a point where the half section line running east and west dividing section 21 intersects said east bank of said river; thence east along said half section line to the west boundary line of the Jeremiah Stevenson donation claim; thence south 11.91 chains along the said Stevenson claim west boundary line to the southwest corner of the Stevenson claim; thence east along the south boundary line of the said Stevenson claim to a point 20 chains west from the east line of said section 21; thence south 8.09 chains to the north boundary line of said Aaron Purdy claim; thence west on the northern boundary line of said Purdy claim 40 chains to the N. W. corner of the said Purdy claim; thence south 16 chains to the place of beginning, containing seventy-one acres, more or less, save and except all the timber lying north of the south line of the aforesaid Stevenson claim, if extended to the east bank of the aforesaid river.

Ninth. Indemnity school lands described as the W. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and lot No. 2 in section 10, and lots Nos. 1, 2, and 3 in

section 4, all in township 6 S., R. 3 W., Willamette meridian, containing three hundred and thirty-four and $\frac{89}{100}$ acres.

Tenth. The donation land claim of Aaron Purdy and Belinda Purdy, his wife, situate in township 6 south, range 3 west, bounded and described as follows: The east $\frac{1}{2}$ of the west $\frac{1}{2}$ and the east $\frac{1}{2}$ of section 28; the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 21; the fractional west $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ (lots 3 and 4) of section 27, containing $630\frac{48}{100}$ acres, more or less.

Eleventh. The donation land claim of Georgie B. Wagnon and wife, situate in township 6 south, range 3 west, described as follows: The south $\frac{1}{2}$ of lot 3 and all of lot 4, section 9; the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the N. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ of section 10, and the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and lots 1 and 2 in section 15, containing 317 acres, more or less.

Twelfth. The donation land claim of John Baum and Phebe S. Baum, his wife, certificate No. 2,757, notification No. 632, described as follows: The W. $\frac{1}{2}$ and N. W. $\frac{1}{4}$ of N. E. $\frac{1}{4}$, and lots Nos. 1, 2, 3, 4, and 5, of section 7, and lots 1, 2, 3, 4, 5, and 6, of section 8, all in township 8 S., range 2 W., containing $615\frac{76}{100}$ acres of land, more or less.

Thirteenth. The north half of the donation land claim of William H. Rector and Ann Rector, his wife, said claim being designated at the land office as "claim" No. 45, and embracing parts of section 7, 8, 17, and 18, in township 8, S., range 2 W., the said north half of said claim containing 320 acres, more or less.

Fourteenth. A part of the donation land claim of David Leslie and wife, situate in township 7 S., range 3 W., of the Willamette meridian, known as claim No. 45, the part intended to be conveyed by said mortgage being therein described as being bounded and described as commencing at a point in the south boundary line of

said claim, 6.25 chains S. 89° 30′ W. from the S. E. corner of said claim, running thence N. 1° 00′ E., parallel to the east line of said claim 8.05 chains; thence E. 10.83 chains (the last 4.58 chains of this line being along the south line of the land of said claim); thence N. 0° 30′ E. 17.06 chains; thence W. 35.07 chains; thence S. 2° 30′ W. 25.30 chains to the south line of the claim; thence N. 89° 30′ E. along the south line of the claim 25.27 chains to the place of beginning, containing 80 acres of land, more or less.

Fifteenth. The donation land claim of F. S. Hoyt and wife, the same being known in the land office as notification No. 69, and claim No. 53, in township 7 S., range 3 W., containing 131 acres, more or less, together with all the tenements, hereditaments, and appurtenances to said lands belonging.

That the condition of said mortgage was such that if the said Thomas Cross should well and truly pay the said promissory note hereinbefore mentioned, principal and interest, according to its form and tenor, then the said mortgage should be void; but if default should be made in the payment of the principal or interest on said note then the said mortgagees therein, their heirs or assigns, were authorized and empowered to foreclose said mortgage and sell the property therein described, and from the proceeds thereof to pay the amount due on said note and all costs and disbursements of suit and costs and expenses of sale.

That it was in and by said mortgage further expressly provided that in the event of a foreclosure of said mortgage and sale of said mortgaged property that the tracts in said mortgage and herein numbered as fourteenth and fifteenth should be sold separately, and that said tracts should not at all be sold if sufficient should be realized from the sale of the other property therein described to pay the full amount due on said

note and the costs, disbursements, and expenses of foreclosure and sale.

That thereafter, to wit, on the 3d day of November, A. D. 1871, the said mortgage was duly recorded at pages 71, 72, 73, and 74 of Book No. 6 of Records of Mortgages for the County of Marion, State of Oregon.

And your orator avers that said promissory note is long past due and owing; that no part thereof has been paid save and except the interest thereon to November 1, 1875, and the following on account of the interest accrued thereon, to wit: $887.37 on January 1, 1877; $664.60 on December 12, 1877; $242.25 on January 29, 1878; $938.00 on February 2, 1880, and $869.49 on December 22, 1881.

That there is now long past due and owing on said note the sum of $45,137.04 and interest thereon, at the rate of ten per cent. per annum, from December 22, 1881.

That the said Pluma F. Cross departed this life on or about the 16th day of September, 1872; that after her said demise the said Thomas Cross was married to the defendant Adelia Cross.

That Thomas Cross departed this life on February 5, 1884.

That the said defendants, John G. Wright and Edwin C. Cross, administrators of the estate of said Thomas Cross, deceased, have assets in their hands applicable to the payment of the promissory note hereinbefore mentioned.

That after the said administrators had duly qualified as such, and heretofore, the said claim and demand of your orator against said Thomas Cross, deceased, was duly presented to said administrators, as by law required, and within six months after the death of said Thomas Cross.

That the said claim of your orator was by said administrators, on July 8, 1884, rejected, and their said rejection was indorsed on said claim, as by law directed.

That after said presentation of said claim to said administrators, and heretofore, the said Allen & Lewis, for a valuable consideration to them paid by your orator, duly indorsed and delivered so indorsed to your orator the promissory note hereinbefore mentioned, and did thereafter and heretofore, for such valuable consideration, make, execute, and deliver to your orator an assignment of said mortgage hereinbefore mentioned.

And your orator further complaining unto your honors, does further and separately and for other and different complaint aver and show—

That the defendant, Thomas Cross, did heretofore, to wit, on the 23d day of January, A. D. 1872, duly make, execute, stamp, and deliver to L. H. Allen and C. H. Lewis his certain promissory note, in which and whereby he did, for value by him received, promise to pay to the order of L. H. Allen and C. H. Lewis, in one year after said last-named date, the sum of ten thousand ($10,000) dollars, with interest thereon from the date of said note, at the rate of one per cent. per month, until paid.

That in order to secure the payment of the said promissory note the said Thomas Cross, together with his then wife, Pluma F. Cross, did, on the 25th day of January, A. D. 1872, duly make, sign, seal, stamp, acknowledge, and deliver to said L. H. Allen and C. H. Lewis their, the said Thomas and Pluma F. Cross' deed of mortgage, in which and whereby they did mortgage to said L. H. Allen and C. H. Lewis all of the property hereinbefore described, and also the following described property, to wit: The S. half of block 30, in the city of Salem, Marion County, State of Oregon; also parts of lots 1 and 2, in block 20, situate in the city of Salem, Marion County, Oregon, and described as commencing at a point at the north line of lot No. 1 aforesaid, 60 feet E. of N. W. corner of said lot 1, thence S. at right angles to the S. line of lot No. 2 aforesaid; thence E. 22 feet 6 inches;

That although so absolute upon its face the said deed was intended by the parties thereto, and in fact was a deed in trust to said C. H. Lewis for and upon the following trusts: That said C. H. Lewis should, at the cost and expense of said lands, keep the same in cultivation or lease or let the same or any part thereof; to sell and dispose of the crops, and collect the rents, and to apply the same upon said mortgage debts of said Thomas Cross hereinbefore mentioned; that it was also understood and agreed between the parties to said deed that said C. H. Lewis might at any time sell any portion or portions of said lands at private sale with the consent of said Thomas Cross, and upon such sales to apply the proceeds towards the liquidation of the amount due on said notes as aforesaid.

And your orator avers that much of said mortgaged property is let and cultivated and that most of the rental obtained from said lands is in shares or proportions of the crops raised thereupon; that the season for harvesting said crops and for obtaining and collecting the rental of said lands is rapidly approaching, and that there is no proper person to collect and receive and receipt for the same.

That upon a sale of all of said mortgaged property the same will not realize sufficient to pay your orator's demands.

That it is to the best interest of your orator and of all the defendants herein that a provisional receiver be appointed herein to collect, take, receive, and receipt of all rents arising from said lands, and where necessary, to reduce said rents to money, and to care for the proceeds of such sales pending this suit and the application by your honor of the moneys so to be derived therefrom.

That it is for the benefit and best interest of all concerned that much of said lands be at once let or leased, pending this suit, in order that the said lands may re-

ceive proper care and be made to realize pending this suit and during the coming season.

That all of said properties herein described are in need of care and attention generally; that unless a receiver is appointed and the care suggested bestowed upon said properties your orator fears and he alleges that said lands will greatly depreciate in value and much diminish your orator's securities.

And your orator further shows that each and all of the defendants herein named claim some interest in or lien upon some or all of the property herein described.

And your orator further avers that the interest or lien of each and all of said defendants is long subsequent in point of time and is subject to each and both of your orator's mortgages hereinbefore mentioned.

And your orator prays that your honors will appoint immediately upon the filing of this your orator's bill of complaint some suitable and qualified person to take charge of and protect the properties hereinbefore described pending this suit or until otherwise ordered by your honors.

And that each and all of the defendants herein may answer the premises, and that an account be taken, under the direction and decree of this honorable court, of what is due and owing to your orator for principal moneys and interest on the security of said mortgaged premises; and that the defendants and each and all of them, and all persons claiming by, through, or under them, or either of them, may be absolutely barred and foreclosed of and from all right and equity in and to the said mortgaged premises and every part thereof save only of the statutory right to redeem.

That a sale may by final decree herein be ordered of said mortgaged premises in accordance with the terms and conditions of said mortgages; that after the payment of the costs and disbursements of this suit and costs and

expenses of sale that so much thereof as may be necessary from the remainder of the proceeds of said mortgaged premises be decreed to be pay-unto your orator, and that your orator may have such other and further relief in the premises as the nature of his case shall require and to your honors shall seem meet; and may it please your honors to grant unto your orator the most gracious writ of subpœna of the United States of America, to be directed to each and all of the above-named defendants, thereby commanding them and each and every of them, under a certain pain therein to be specified, personally to be and appear before your honors in this honorable court, and then and there to answer all and singular the premises, and to stand, to perform, and abide such order and decree therein as your honors shall deem agreeable to equity and good conscience; and your orator shall ever pray.

L. H. ALLEN,
Complainant.

M. W. FECHHEIMER and
HENRY ACH,
Solicitors for Complainant.

UNITED STATES OF AMERICA, }
District of Oregon. } *ss:*

I, Henry Ach, being first duly sworn, on oath say I am one of the attorneys and solicitors for the complainant in the above-entitled suit; that said complainant is not within the district of Oregon, which is the reason why I make this affidavit.

That the foregoing bill of complaint is true, as I verily believe.

HENRY ACH.

Subscribed and sworn to before me this the 6th day of August, A. D. 1884.

J. B. THOMPSON,
[SEAL] *Notary Public for Oregon.*

(Endorsed:) Filed August 6, 1884, R. H. Lamson, clerk, by G. G. Gammons, deputy.

After the filing of the answer thereto (Record 24–32) exceptions for impertinence were filed to portions thereof, which, being over-ruled, the plaintiffs in the court below on the suggestion of the court amended their said bill by filing the following statement of facts (Record, 49–52):

AMENDMENTS TO BILL OF COMPLAINT.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

L. H. ALLEN, Complainant, *vs.* ELIZA O'DONALD, JONATHAN O'DONALD, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Francis E. Cross, his wife; Edwin C. Cross; P. May Wilson and John T. Wilson, her husband; Frank Cross, a minor, sued herein by his guardian *ad litem*, Ewin C. Cross, heirs of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross; John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, defendants.	In Equity.

To the Judges of the Circuit Court of the United States for the District of Oregon:

The complainant, by leave of the court, presents and files these his amendments to his bill of complaint filed herein, to be inserted as follows:

After the words "*at private*" in line seven of page twenty thereof, insert the words "*or public.*"

On the same page, after the word "aforesaid," in line eleven, insert the following:

"And complainant further alleges that during the year 1876 and prior to the 14th day of October, 1876, the said defendant, C. H. Lewis, caused the lands above described as situated in sections 3, 9, 10, 15, 16, 21, 22, 27, and 28, in township 6 south, of range 3 west, Willamette meridian, containing in all 2,326.37 acres, more or less, to be surveyed and divided into parcels, numbered from 1 to 55, inclusive, each parcel containing about 40 acres of land, and at the same time caused and procured an appraisement and valuation of such lands so surveyed to be made by the said Thomas Cross, deceased, and by other disinterested persons familiar with the character and value of said lands, and also caused and procured a plat or map of such survey to be made, and which map or plat was recorded in the office of the County Clerk of Marion County aforesaid by said Thomas Cross, deceased, on the 14th day of November, 1876, where the same now remains on record.

"*That on the 14th day of October, A. D. 1876, and subsequent thereto, and prior to November 15, 1876, the defendant C. H. Lewis, under and by virtue of such understanding and agreement with Thomas Cross, deceased, sold and disposed of certain portions of said mortgaged premises, to wit:*

"First. To one J. I. Thompson the land known and described upon the survey and plat of said lands as lots numbered 53, 54, and 55, and upon the Government survey as lots 1, 2, and 3, in section 4, in said township 6 S., range 3 W., containing $187\frac{65}{100}$ acres, for the sum of $397.98, which had been appraised at $750; also the lands known and described upon the hereinbefore mentioned survey and plat of said lands as lots 38, 39, 40, and 42, and known upon the Government survey thereof and bounded as follows: Commencing 26.44 chains south and

25.50 chains west of the northeast corner of section 16, in township 6 S., range 3 W., and running thence south 89° 17′ E., 21.81 chains; thence S. 00° 30′ W., 20 chains; thence S. 89° 17′ E., 20 chains; thence S. 00° 30′ W., 20.43 chains; thence S. 77° 31′ W., 44.81 chains; thence N. 2° E., 51.50 chains to place of beginning; also lots 3, 4 and 9, all in section 16, township 6 S., range 3 W., containing $225\frac{48}{100}$ acres, for the sum of $3,435.52, which had been appraised at $3,466.50, the deed to said lands sold to said Thompson being dated the 15th day of November, 1876, and recorded in Book 21 of Deeds, at page 256, records of Marion County, aforesaid.

"Second. To one C. C. Keney, lands known upon said survey and plat as lots 44, 45, 49, and 50, and known upon the Government survey as the E. ½ of the S. W. ¼ and fractional lot No. 2, all in section 10, and the N. E. ¼ of the N. W. ¼ and fractional lot No. 2, of section 15, all in said township 6 S., range 3 W., of the Willamette meridian, containing $160\frac{2}{100}$ acres, for the sum of $1,680.21, which lands were appraised at $1,733.75, and the deed whereof is dated the 15th day of November, A. D. 1876, and recorded in Book 21 of Deeds, at page 256, records of said county of Marion.

"Third. To one S. R. Scott, the lands known upon said survey and plat as Nos. 51 and 52, and upon the Government survey as a portion of section 10, in township 6 S., range 3 W., aforesaid, containing 80 acres, for the sum of $480, which had been appraised at $560, and the deed whereof is dated the 15th day of November, 1876; also lands known as upon said survey and plat as lot 43, and being in section 15, lots 46 and 48, in section 10, and lot 47, in section 9, township 6 S., range 3 W., aforesaid, containing $209\frac{36}{100}$ acres, for the sum of $2,600, which had been appraised at $1,913.10, the deed whereof is the same deed last above mentioned.

"That of the lands so as aforesaid sold by said C. H.

Lewis, lots 38, 39, 40, 42, 43, 46, 47, and 48 thereof, as designated upon said plat and survey, were sold subsequent to said 14th day of October, 1876, at private sale, and that the remainder of such lands so as aforesaid sold by said C. H. Lewis, were sold at public auction at the State fair grounds at Salem, Oregon, on said 14th day of October, A. D. 1876; that such sales were long prior thereto extensively advertised throughout the State of Oregon, in the following newspapers to wit, the 'Daily Oregonian' and the 'Daily Evening Standard,' printed and published at Portland, Oregon; in the 'Willamette Farmer,' the 'Salem Statesman' and 'Mercury,' and in the 'State Fair Gazette,' printed and published at Salem, Oregon; and by hand-bills and posters distributed throughout the counties of Marion and Polk, State of Oregon.

"That such sales were openly and fairly conducted, and the prices obtained for the lands so as aforesaid sold thereat were the fair and reasonable value of such land and the best prices obtainable therefor.

"That the costs and expenses of such sale, cost of advertising, surveying, appraising platting, and mapping such lands amounted to the sum of $809.85; that prior to the execution and delivery of said notes and mortgages, as hereinbefore stated, to wit, on the the 15th day of June, 1867, the said Thomas Cross and Pluma F. Cross, his wife, both deceased, made, executed, signed, sealed, duly stamped, acknowledged, and delivered to the board of commissioners for the sale of school lands and the management of the common-school fund for the State of Oregon a mortgage upon a certain portion of the premises covered by the mortgage to this complainant, to wit, the northeast quarter of section (22) twenty-two, the north half of the southeast quarter of section twenty-two, the southwest quarter of the southeast quarter of section twenty-two, the southeast quarter of the southwest quar-

ter of section twenty-two of township six (6) south of range (3) three west. in Marion county aforesaid, containing 320 acres, more or less; which mortgage was given to secure the payment of a certain promissory note executed by said Thomas Cross to the mortgagee named in said mortgage of even date with said mortgage, for the sum of $594.00 principal, payable one year from the date thereof, with interest from date thereof at ten per cent. per annum, principal and interest payable only in United States gold coin, which mortgage was on the 18th day of June, 1867, recorded in volume No. 4, at page 500, records of mortgages of said Marion County; that on the 22d day of March, 1876, the said note and mortgage were long past due and unpaid, and the lien of said mortgage still existed and was a prior lien to that of the mortgage held by complainant upon the lands described therein; and that on said date last named there was due upon said note and mortgage the sum of $725.50, principal and interest; and that on the said last-named date the defendant, C. H. Lewis, at the request of said Thomas Cross, and in order to prevent a foreclosure of said mortgage and a sale of the premises covered thereby, did pay said sum of $725.50 so due upon said mortgage to the mortgagers named therein and caused and procured the said mortgage to be satisfied upon record.

"That at the date of execution and delivery of the notes and mortgages first in this bill mentioned the said Thomas Cross, deceased, was not the legal owner of certain portions of said mortgaged premises, to wit, lots 3, 4, and 5, and the southwest ¼ of the southwest ¼ of section 22 and lot 6 of section 21, all in said township 6 south of range 3 west, in Marion County, Oregon, containing 110.87 acres; but that he then held a bond for a deed thereof from the board of commissioners for the sale of school lands of the State of Oregon, and that on the 22d day of March, 1876, there was due upon said bond from said

Thomas Cross to said board of commissioners the full sum of $221.74, which sum was required to be paid in order to entitle said Thomas Cross to a deed of said land; and that on the said 22d day of March, 1876, the defendant, C. H. Lewis, at the request of said Thomas Cross, deceased, and in order to prevent and avoid a forfeiture to the estate of said lands and to perfect the title thereto, did pay to said board of commissioners said sum of $221.74, and did thereupon receive from the State of Oregon a deed to said lands, which deed is dated the 27th day of March, 1876, and is recorded in Book 18 of Deeds, page 671, records of Marion County, Oregon.

"And your orator further says that all the moneys realized from such sales of said lands, after deducting the expenses, costs, and charges thereof and the cost of platting, survey, and appraisement thereof, as hereinbefore stated, and after deducting said sums so as aforesaid paid in satisfaction of said mortgage and bond hereinbefore mentioned to said board of commissioners, were applied towards the satisfaction and payment of the notes and mortgages held by your orator; and that on the 22d day of November, 1878, your orator and defendant, C. H. Lewis, made, executed, sealed, acknowledged, and delivered to said Thomas Cross, deceased, a release from the operation and lien of said mortgage of all the lands so as aforesaid sold except the lands known upon the said plat and survey as lots 43, 46, 47, and 48, which release is recorded in Book 10 of Mortgages at page 235, records of said Marion County."

In the line 26 of the same page of said bill, after the word "demands," add the words "by more than twelve thousand dollars, and that the amount which would be realized upon a sale of the whole of the property now covered by said mortgages will not exceed the sum of sixty-five thousand dollars."

FECHHEIMER AND ACH,
Counsel for Complainant

UNITED STATES OF AMERICA, } ss:
District of Oregon, }

I, Henry Ach, being first duly sworn, on oath say that I am one of the counsel for the complainant herein; that said complainant is not now within the district of Oregon, which is the reason why I make this verification; that I have read the foregoing averments and know the contents thereof, and that the same are true as I verily believe.

(Signed) HENRY ACH.

Subscribed and sworn to before me this 22d day of May, A. D. 1885.

(Signed) J. B. THOMPSON,
[SEAL.] *Notary Public for Oregon.*

Endorsed: Filed June 1, 1885.
(Signed) R. H. LAMSON, *Clerk.*

ANSWER.

The answer interposed by the appellants herein, E. C. and Frank R. Cross, is in the following language:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

L. H. ALLEN, Complainant,

vs.

ELIZA O'DONALD and JONATHAN O'DONALD, her husband; William T. Cross and Christina Cross, his wife; Caroline Wright and John G. Wright, her husband; James Cross and Francis E. Cross, his wife; Edwin C. Cross; P. May Wilson and John T. Wilson, her husband, and Frank Cross, a minor, heirs-at-law of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross, and John G. Wright and Edwin C. Cross, administrators of Thomas Cross, deceased, and C. H. Lewis, defendants.

ANSWER.

The joint and several answers of Edwin C. Cross and Frank Cross, by Edwin C. Cross, his guardian ad litem, two of the defendants. (Record 24–32.)

These defendants, now and at all times hereinafter saving to themselves all and all manner of benefit or advantage of exception or otherwise that can or may be had or taken to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as these defendants are advised it is material or necessary for them to make answer to, answering, saith:

Defendants admit that at all the dates and times herein mentioned, as alleged in said bill of complaint, complainant has been and still is a citizen of the State of California; admit that at all the times mentioned in said bill of complaint, up to the time of their decease, Thomas and Pluma F. Cross were citizens of the State of Oregon; admit that Elizabeth and Jonathan O'Donald are husband and wife and citizens of the State of Oregon; admit that Caroline and John G. Wright are husband and wife and are citizens of the State of Oregon; admit that William F. Cross and Christina Cross are husband and wife and are citizens of the State of Oregon; admit that James and Francis Cross are husband and wife and are citizens of the State of Oregon; admit that P. May Wilson and John T. Wilson are husband and wife and are citizens of the State of Illinois; admit that Edwin C. Cross and Frank R. Cross are citizens of the State of Oregon, and that Adelia Cross is the widow of Thomas Cross, deceased, and that Frank Cross is a minor and under the age of 18 years; admit that all the persons above-named, save and except the widow, Adelia Cross, are heirs-at-law of Thomas Cross, but denies that all or any of said above-named persons (defendants) are

heirs-at-law of Pluma Cross, except said P. May Wilson and these defendants. Defendants admit that John G. Wright and Edwin C. Cross are citizens of the State of Oregon, and are the duly appointed, qualified, and acting administrators of the estate of Thomas Cross, deceased; admit that the defendant, C. H. Lewis, is and at all times mentioned in said bill of complaint, a citizen of the State of Oregon; admit that at all the times mentioned in said complaint said complainant and the defendant, C. H. Lewis, were co-partners together doing business under the firm name of Allen & Lewis.

Defendants admit that on November 1, 1871, the said Pluma F. Cross and Thomas Cross were husband and wife; admit that on said November 1, 1871, the said Thomas Cross, for value received, made, executed, and delivered to said firm of Allen & Lewis, his, said Cross', certain promissory note in which and whereby he promised to pay to the order of Allen & Lewis, in three years after said date last-mentioned, the sum of $30,000 in United States gold coin, with interest thereon payable semi-annually, at the rate of 10 per cent. per annum from the date of said note; admit that on said November 1, 1871, said Thomas Cross and Pluma F. Cross, in order to secure the payment of said note and interest, made the mortgage, as alleged in said complaint, on the lands therein described. Defendants admit that the condition of the said mortgage was such that if the said Thomas Cross should well and truly pay the said promissory note hereinbefore mentioned, principal and interest, according to its form and tenor thereof, the said mortgage should be void; but if default should be made in the payment of principal or any interest on said note, then the said mortgagees therein, their heirs or assigns, were authorized and empowered to foreclose said mortgage and sell the property therein described, and from the proceeds thereof to pay the amount due on said note

and all costs and disbursements of suit and all costs and disbursements of sale. Defendants admit that it was in and by said mortgage expressly provided that in the event of foreclosure of said mortgage and sale of said mortgaged property that the tracts therein in said mortgage, and numbered in said complaint as 14 and 15, should be sold separately, and that said tracts should not at all be sold if sufficient should be realized from the sale of the other property therein described to pay the full amount due on said note and the costs, disbursements, and expenses of foreclosure and sale. Defendants admit that said mortgage was duly recorded in Marion County, Oregon, as alleged in said complaint. Defendants admit that said promissory note is long past due and owing; that no part of the same has been paid except as alleged in said bill of complaint. Defendants deny that there is long past due or due at all or owing on said note the sum of said $45,137.04, or interest thereon at the rate of ten per cent. per annum, or at any other rate, from December 22d, 1881, or from any other time or any other greater sum than $45,137.04, and interest on $30,000 since December 22d, 1881, at ten per cent. per annum. Defendants admit that the said Pluma Cross departed this life on or about the 16th day of September, 1872; that after her said death the said Thomas Cross was married to the defendant, Adelia Cross; that said Thomas Cross departed this life on February 5th, 1884; deny that the said defendants, John G. Wright or Edwin Cross, administrators of the estate of the said Thomas Cross, deceased, have assets in their hands or in the hands of either applicable to the payment of the promissory note hereinbefore mentioned, or any part thereof. Defendants admit that after the said administrators had duly qualified as such, the said claim and demand of said complainant against said Thomas Cross, deceased, was duly presented to said administrators, as

by law required, and within six months after the death of said Thomas Cross. Defendants admit that the said claim of complainant was by said administrators on July 8, 1884, rejected and their said rejectance was duly indorsed on said claim, as by law directed. Defendants admit that after said presentation of said claim to said administrators, the said Allen & Lewis, for a valuable consideration to them paid by said complainant, duly indorsed, and delivered to the said complainant, so indorsed, the promissory note hereinbefore mentioned, and did thereafter and heretofore for such valuable consideration, make, execute, and deliver to said complainant an assignment of said mortgage hereinbefore mentioned.

These defendants for answer to said complainant's second cause of suit in said bill of complaints contained, saith:

Defendants admit that Thomas Cross did heretofore, to wit, on the 23d day of January, A. D. 1872, duly make, execute, stamp, and deliver to L. H. Allen and C. H. Lewis his certain promissory note, in which and whereby he did, for value by him received, promise to pay to the order of L. H. Allen and C. H. Lewis, in one year after said last-mentioned date, the sum of $10,000, with interest thereon from the date thereof at the rate of one per cent. per month, until paid, admit that in order to secure the payment of said promissory note the said Thomas Cross and Pluma Cross, his wife, made, executed, and delivered to said L. H. Allen and C. H. Lewis a deed of mortgage, as alleged in complainant's second cause of suit in said complaint, on the property therein described. Defendants admit that the condition of said mortgage was such that if the said Thomas Cross should well and truly pay the promissory note hereinbefore last described according to the terms thereof, then the said mortgage should be void; but if default should be made,

then the said mortgagees or their legal representatives might foreclose said mortgage according to law.

Defendants admit that said last mentioned mortgage was duly recorded in Marion County, Oregon, as alleged in said second cause of suit. Defendants admit that said promissory note is long past due and owing, and that no part thereof has been paid save and except the interest thereon to January 25th, 1879, and the further sum of $1,686.35, paid on account of interest, on February 1st, 1883. Defendants admit there is now due and owing on said note the sum of $10,000, with interest thereon from January 29th, 1879, at one per cent. per month, less the sum of $1,686.35, paid on account of said interest. Defendants deny that the defendants, John G. Wright or E. C. Cross, administrators, as hereinbefore admitted, have or had assets in their hands or possession to said estate belonging which are applicable to the payment of the amount due on said last-mentioned note or any part thereof.

Defendants admit the said claim, and demand has been duly presented to said administrators, as by law required, and by them heretofore rejected and their rejectance by them duly indorsed on said claim and the proof thereof; admit that after the presentation of said claim the said C. H. Lewis, for a valuable consideration to him in hand paid by said complainant, did sell and indorse, and so indorsed deliver to said complainant the said promissory note last mentioned and all his, said Lewis', rights and interests therein, and did also thereafter, for a valuable consideration, duly assign to said complainant the said mortgage herein last described.

Defendants admit that said Thomas Cross was the husband of C. M. Cross, who thereafter and prior to the marriage of said Thomas Cross to Adelia Cross, became divorced from said Thomas Cross. Defendants admit that upon the said 22d day of January, A. D. 1876, the

said Thomas Cross was indebted and owing upon said promissory notes hereinbefore mentioned. Defendants admit that all of said mortgaged property, except the property in the city of Salem, are now and were upon said last-named dates farming and agricultural lands, and large portions thereof were and are under cultivation. Defendants admit that on said 22d day of January, 1876, the said Thomas Cross and his then wife duly made, executed, acknowledged, and delivered to the defendant, C. H. Lewis, who was then a part owner of said notes and mortgages hereinbefore mentioned, an instrument upon its face purporting to be an absolute deed of warranty to all the property described in said bill of complaint and subject only to the mortgage herein first mentioned. Defendants admit that said mortgage was duly recorded in Marion County, Oregon, as alleged in said bill of complaint. Defendants deny that although so absolute upon its face the said deed was intended by the parties thereto, or was in fact or at all, a deed in trust to C. H. Lewis for upon the following alleged pretended trusts, that said C. H. Lewis should at the cost or expense of said lands, or any part thereof, keep the same in cultivation or lease, or let the same or any part thereof; to sell or dispose of the crops or collect the rents, or to apply the same or any part thereof upon said mortgage debts of said Thomas Cross hereinbefore mentioned. Defendants deny that it was also or at all understood or agreed between the parties to said deed that said C. H. Lewis might at any time or at all sell any portion or portions of said land at private sale or at all, with the consent of the said Thomas Cross, or, upon such alleged sales, to apply the proceeds towards the liquidation of the amounts due on said notes as aforesaid; deny that the interests or liens of these defendants is long, or subject at all or subsequent in point of time or otherwise, or is subject to each or either of complainant's mortgages.

And these defendants, by way of further and different answer to said complainant's bill of complaint, saith that at the time of the execution of the two mortgages described in complainant's bill, for a long time prior thereto, and continuously thereafter until her death, the said Pluma F. Cross was the owner in fee simple of all that portion of said mortgaged premises designated and described in said bill as Nos. 14 and 15, and more particularly described as a part of the donation land claim of David Leslie and wife, situated in township 7 S., and range 3 W., of the Willamette meridian, and known as claim 45, being bounded and described as commencing at a point in the south boundary line of said claim 6.25 chains S., 89° 30′ W., from the southeast corner of said claim, running thence north 1° 00′ east parallel to the east line of said claim 8.05 chains; thence east 10.83 chains (the last 4.58 chains of this line being along the south line of the land of said claim); thence west 0° 30′ E. 17.06 chains; thence west 35.07 chains; thence south 2° 30′ W. 25.30 chains to the south line of said claim, 25.27 chains to the place of beginning, containing eighty acres of land, more or less, situated in Marion County, Oregon; also the donation land claim of F. S. Hoyt and wife, the same being known in the land office as No. 69, and claim No. 53, in T. 7 S., R. 3 west, containing one hundred and thirty-one acres, more or less, together with all the tenements, hereditaments, and appurtenances to said lands belonging, situated in said county of Marion and State of Oregon; that prior to the execution of said mortgages and both of them, as well as the promissory notes for the payment of which they were made to secure, the said firm of Allen & Lewis, mentioned in complainant's bill, had loaned to and advanced for and on account of said Thomas Cross, deceased, a large sum of money, to wit, about $60,000, which sum of money the said Thomas Cross was then unable to pay;

that as soon as the said Allen & Lewis became aware of the inability of the said Cross to pay said demand they became exceedingly anxious to obtain security therefor, and to that end they importuned the said Pluma Cross, who was the mother of these defendants, to mortgage her said lands and also to join her husband in the execution of the mortgages upon his own lands described in complainant's bill as security for the said debt of her husband, Thomas Cross, and for no other purpose and for no other consideration; that the said Pluma Cross readily consented to join her husband in the execution of the mortgages upon his own lands, but for a long time objected to including her said lands in said mortgages as aforesaid or at all; but finally, through the importunity of said Allen and Lewis and their attorney, Wm. Gentry, Esq., and the importunity of her said husband, and the assurance of all of them that the said lands of the said Thomas Cross were more than ample security for said debt, she consented to interpose her said lands as security only for said debt of her said husband, with the provision in the said mortgage contained; that in said mortgage it was expressly stipulated and agreed that in the event of a failure to pay said sum of money in the mortgage provided the said mortgage should be foreclosed in the manner provided by law; and the said defendants saith that no other or different mode or manner of sale of said lands was provided or contemplated by the parties thereto; and these defendants further show to your honors that long after the death of the said Pluma Cross, as alleged in complainant's said bill, to wit, about the — day of November, 1876, the said Allen & Lewis, on the one part, and the said Thomas Cross on the other part, entered into an agreement, in pursuance of which they sold, contrary to the terms and conditions of both of said mortgages, large bodies of the said mortgaged lands and each of them for the considerations hereinafter mentioned;

executed the necessary deeds and releases thereto so as to place the fee thereof in the several purchases free and released from the liens of both of said mortgages; that is to say, to J. I. Thompson, all that part of said land described as lots 53, 54, and 55, and known on the maps and plats of the Government surveys as lots Nos. 1, 2, and 3, of section 4, T. 7 S., R. 3 W., of the Willamette meridian, containing 187.68 acres; also lots Nos. 38, 39, 40, and 42, as known on the Thomas Cross maps and surveys recorded in Marion County, Oregon, in the county clerk's office of said county, on the 14th day of November, 1876, and more particularly, as follows: Commencing 26.44 chains south and 25.50 chains west of the N. E. corner of section 16, in township 6 S., range 3 W., and running thence south 89° 17′ E. 21.81 chains; thence S. 00° 30′ W. 20 chains; thence S. 89° 17′ E. 20 chains; thence S. 00° 30′ W. 20.43 chains; thence S. 77° 30′ W. 44.81 chains; thence N. 2° 00′ E. 51.50 chains to place of beginning; also lots Nos. 3, 4, and 9, of section 16, township 6 S., range 3 W., according to the plats of the Government surveys, containing $225\frac{28}{100}$ acres, for the sum of $3,834, to them then and there paid by said Thompson; that at the time of said sale to said Thompson said land was well worth and should have, under ordinary circumstances, sold for the sum of $10,000.

Second. To C. C. Kemly all that part of said lands described as follows, to wit: Lots Nos. 44, 45, 49, and 50, as per said Cross maps, and more particularly described as the east $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, and fractional lot No. 2, of section 10, and the N. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, and fractional lot No. 2, of section 15, in township 6 S., range 3 W., of the Willamette meridian, according to the plats and Government surveys containing $160\frac{2}{100}$ acres, for the sum of $1,680.20, to them then and there paid by said Kemly therefor; that at said time said land so sold to said Kemly was well worth and would have, under ordinary circumstances, sold for $4,000.

Third. To S. R. Scott lots Nos. 51 and 52, as known and designated on said Cross maps, said land so sold to said Scott being situated in township 6 S., range 3 W., of the Willamette meridian, Marion County, Oregon, and containing 80 acres; also lots Nos. 43, 46, 47, and 48, as shown by said Cross maps, containing $309\frac{36}{100}$ acres, in said township 6 S., range 3 W., Marion County, Oregon, for the sum of $3,080 to them in hand there paid by said Scott therefor; that at said time said lands were sold to said Scott they were well worth and would have, under ordinary circumstances, sold for $6,000; and these defendants saith that in making the said sales of said property as aforesaid, the said Thomas Cross and the said Allen & Lewis expended large sums of money, to wit: The sum of $15,000, as fees to surveyors and commissioners and real estate agents, which sum the said Allen & Lewis wrongfully charged against the proceeds of said sales as realized by them; and these defendants further saith that the sums of money for which said lands were sold as aforesaid, nor any part of the same, were never credited upon the said notes or mortgages; and these defendants saith that said sales were so made without their acquiescence or consent, and that the whole sum received by said Allen & Lewis and said Thomas Cross on account of said sales was $8,594.20, and the aggregate value thereof at the dates of such sales was $20,000; and these defendants further answering saith that the said lands of their said mother, Pluma F. Cross, ought to be excepted and released from the operation and effect of said mortgages and conveyances described in complainant's bill; that said lands of their said mother, Pluma Cross, were worth at the dates of said wrongful sales to said J. I. Thompson, C. C. Kemly, and S. R. Scott, as aforesaid, and are now worth the sum of $10,000 and no more; and these defendants, further answering, saith they are informed and believe, and allege the

fact to be, that the firm of Allen & Lewis, while they owned and controlled said notes and mortgages and after they were both due and payable, contracted at divers times, for good and sufficient considerations, with said Thomas Cross for extension of the time of the payment of said notes and mortgages for definite periods of time when each of said contracts were so made; but these defendants show to the court that they are unable to better plead said facts, for the reasons that they received the information upon which said allegations are based from their father, Thomas Cross, who is now dead, and they know of no other person save the defendant, C. H. Lewis, who knows of said facts; and these defendants further show to the court that said Lewis, while a nominal defendant in this cause, is largely interested in the result of this suit adversely to these defendants, and that he is unfriendly to these defendants in the matter of said suit, and that the facts necessary to maintain said allegations can only be obtained from said Lewis by process of subpœna and taking his testimony in this cause concerning said facts, by reason whereof these defendants can not more specifically plead the same; and these defendants further showeth to the court that they, with their co-defendant, P. May Wilson, are the only children of said Pluma Cross; that Caroline Wright, Eliza O'Donald, W. T. Cross, and James Cross, are the children of Thomas Cross, mentioned in complainant's bill, but by his former wife, M. G. Cross, who died in Milwaukee, Wis., in or about the year 18—. These defendants, in addition to the foregoing answer, aver that the first cause of suit mentioned in said complaint of complainant, so far as the same relates to the lands of said Pluma Cross, deceased, is stale, the same not having been presented within ten years after her death, and the complainant and his assignors have been guilty of such gross laches in prosecuting said suit, that he ought not in equity and

good conscience be allowed to claim said demands as against said lands of said Pluma Cross, which was security for the debt of her husband, as hereinbefore stated; and these defendants aver that said claim, so far as said Pluma Cross and these defendants are concerned, is barred by the statute of limitations, which facts aforesaid these defendants plead in bar of the complainant's said suit; and these defendants pray that they may have the same benefit from the matters and things last aforesaid as if they had formally pleaded the same; and these defendants, further answering, saith, as to the mortgage mentioned in complainant's second cause of suit, the same was likewise made by these defendant's mother, Pluma Cross, as security only for the debt of her said husband, Thomas Cross, which fact the said Allen & Lewis at the time of the taking of said mortgage well knew; and these defendants, in addition to the foregoing answer, aver that the second cause of suit mentioned in said complainant's bill is, if any such cause there may be, on or account or by reason of the several allegations and complaints in his said bill contained, did not accrue within ten years before said bill was filed, nor did the same accrue within ten years before the death of said Pluma F. Cross, and these allegations these defendants make in bar of the complainant's bill, so far as the lands of Pluma F. Cross therein described are concerned, and pray that they may be allowed and have the same benefit therefrom as if they had formally pleaded the same; and these defendants saith that they are the owners in fee simple of an undivided two-thirds (or one-third each) interest in and to the said lands of said Pluma Cross, their mother, hereinbefore described; and these defendants deny all and all manner of unlawful combination and confederacy wherewith they are by the said bill charged; without this, there is any other matter, cause, or thing in the said complainant's said bill of

complaint contained material or necessary for these defendants to make answer thereto and not herein and hereby well and sufficiently answered, confessed, traversed, and avoided or denied, is true to the knowledge or belief of these defendants, and of which matters and things these defendants are ready and willing to maintain and prove as this honorable court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

(Signed) EDWIN. C. CROSS.

(Signed) N. B. KNIGHT and W. H. HOLMES,

Attorneys for Defendants, E. C. Cross and Frank R. Cross.

UNITED STATES OF AMERICA, *District of Oregon.* } *ss:*

I, E. C. Cross, being duly sworn, say I am guardian *ad litem* of Frank R. Cross, one of the defendants in the foregoing suit; that I know the contents of the foregoing answer of said Frank R. Cross, and that the same is true as I verily believe.

(Signed) EDWIN C. CROSS.

Subscribed and sworn to this 27th day of December, 1884.

(Signed) W. W. THAYER,
Judge Supreme Court.

September 15, 1885, the following stipulation was signed by the solicitors of the respective parties, and filed in this cause (Record 53):

STIPULATION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON. IN EQUITY.

L. H. ALLEN, Complainant,

vs.

ELIZA O'DONALD and JONATHAN O'DONALD, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Francis E. Cross, his wife; Edwin C. Cross; P. May Wilson and John T. Wilson, her husband; Frank Cross, a minor, the latter sued herein by Edwin C. Cross, his guardian *ad litem*, heirs-at-law of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross, deceased; John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, defendants.

In the above-entitled cause it is hereby stipulated by and between the complainant and the defendants, Edwin C. Cross and Frank Cross, the latter sued herein and acting by and through Edwin C. Cross, his guardian *ad litem*, acting by and through their respective counsel, that all the allegations of the amendments to the bill of complainant filed herein, not denied in the answer of the defendants, Edwin C. Cross and Frank Cross, heretofore filed herein, except only the allegation as to the value of the lands sold at auction, as alleged in said amendments to said bill of complaint, shall be considered and taken as admitted, and that no proof shall be required in relation thereto.

And it is further stipulated that the answer heretofore filed herein by said Edwin C. and Frank Cross shall stand as an answer to the said original bill of complaint and said amendments thereto, and that no amended or additional answer shall be filed by said defendants, Edwin C. and Frank Cross.

Dated at Portland, Oregon, Sept. 15, 1885.

FECHHEIMER & ACH,
Solicitors for Complainant.

W. H. HOLMES,
Solicitor for Defendants, Edwin C. and Frank Cross.

(Endorsed:) Filed Sept. 15, 1885. R. H. Lamson, clerk.

The cause was tried upon the aforesaid pleadings and stipulations, together with the following stipulation and deposition. The stipulation is in these words (Record, 75–78):

STIPULATION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON. IN EQUITY.

L. H. ALLEN, Complainant,

vs.

ELIZA O'DONALD and JONATHAN O'DONALD, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; and James Cross and Francis Cross, his wife; Edwin C. Cross; P. May Wilson and John T. Wilson, her husband; Frank Cross, a minor, the latter sued herein by Edwin C. Cross, his guardian *ad litem*, heirs-at-law of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross, deceased; John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, defendants.

In this cause it is hereby stipulated, admitted, and agreed upon by and between the complainant herein and the defendants, Edwin C. Cross and Frank Cross, a minor, said minor sued herein and defending by and through Edwin C. Cross, his guardian *ad litem*, said stipulators acting by and through their respective counsel in this cause as follows, to wit:

First. That the defendants, P. May Wilson, Edwin C. Cross, and Frank Cross are the only heirs-at-law of said Thomas Cross and Pluma F. Cross, both deceased.

Second. That the defendants, Eliza O'Donald, William F. Cross, Caroline M. Wright, and James Cross, are the heirs-at-law of the said Thomas and Malinda Bowen Cross, who was the first wife of said Thomas Cross, and that said Malinda died in Wisconsin on or about the time stated in the joint answer of said Edwin C. and Frank Cross; that there is now due to complainant upon the promissory notes first in the bill of complaint herein mentioned the full sum of forty-five thousand one hundred and thirty-

seven $\frac{4}{100}$ dollars ($45,137.04), with interest thereon at the rate of ten per cent. per annum from December 22, 1881, and that there is now due to complainant upon the promissory note second in said bill of complaint mentioned the sum of ten thousand dollars ($10,000), with interest thereon from June 21, 1880, at one per cent. per month.

Third. That said C. M. Cross, who was the third wife of said Thomas Cross, became divorced from him, and was so divorced at the time of the exhibiting of the complainant's bill of complaint herein.

Fourth. That the deed of January 22, 1876, from said Thomas Cross to the defendant, C. H. Lewis, though upon its face an absolute deed, was in fact and was intended to be a deed conveying the lands and premises therein described in trust to the said C. H. Lewis for and upon the following trusts:

That said C. H. Lewis should, at the cost and expense of said lands, keep the same in cultivation or lease or let the same or any part thereof; to sell and dispose of the crops and collect the rents, and to apply the same when collected, after deducting all necessary and proper charges and expenses in and about the care, custody, and management and control of said premises as aforesaid, upon said mortgage debts in said bill of complaint set forth; and that it was also understood and agreed upon between the parties to said contract that said C. H. Lewis might at any time sell any portion or portions of said lands, either at public or private sale, with the consent of said Thomas Cross, and upon such sales to apply the net proceeds thereof, after deducting all necessary and proper costs, expenses, and charges thereof toward the liquidation of the amount due upon the said two promissory notes in the bill of complaint herein mentioned.

Fifth. That the survey and appraisement mentioned in said bill of complaint and the amendments thereto were made at the time, in the manner, and by the persons as therein set forth and alleged, and that the same was openly made and made without fraud, and that the persons who made the same would now, if testifying in relation thereto, approve and verify said appraisements in all particulars.

Sixth. That the defendants, Edwin C. and Frank Cross,

could produce five witnesses, all of whom reside and own lands in the vicinity of the lands sold at public auction by said C. H. Lewis, as alleged in the said amendments to said bill of complaint filed herein, and competent witnesses, to give opinions relative to the value thereof, who would testify that said lands at the time of the sale thereof were worth the following sums at private sale in the ordinary course of business, to wit:

First. The tract of $187\frac{60}{100}$ acres, more or less, sold to J. I. Thompson for $397.98, which had been appraised at $750.80, was at said time worth $1,000.

Second. The tract of $225\frac{48}{100}$ acres, more or less, sold also to said J. I. Thompson for $3,435, which had been appraised at $3,466.50, was at said time worth $5,000.

Third. The tract of $160\frac{2}{10}$ acres, sold to C. C. Kunney for $1,680.21, which had been appraised at $1,733.75, was at the said time worth the sum of $3,200.

Fourth. The tract which was sold to S. R. Scott, containing 80 acres, for $480, which had been appraised at $560, was at the said time worth the sum of $960.

Fifth. The tract containing $209\frac{36}{100}$ acres, which was sold to said S. R. Scott for $2,600, and which had been appraised at $1,913, was at the said time worth the sum of $3,200.

Sixth. That there has been no administration upon the estate of Pluma F. Cross.

Seventh. That all matters and things embraced in the new matter and additional alleged defenses contained in the said answer of said Frank and Edwin C. Cross and not affected by or included in the terms of stipulation heretofore and on the 15th day of September, 1885, filed herein, or of this stipulation, except the question of the extension of the time of payment of said promissory notes, the consideration therefor, if any, and the effect thereof and the laches imputed to the plaintiff and his assignees and the question of the statute of limitations are hereby expressly waived by the defendants, Edwin C. and Frank Cross; and it is further expressly understood that nothing contained in the foregoing paragraph shall be construed as waiving the question of the sufficiency of the complaint to constitute a cause of suit against the defendants signing this stipulation nor of the question of the jurisdiction of this court to foreclose the

mortgage described in said complaint as against such defendants.

It is expressly understood, stipulated, and agreed that nothing in this stipulation contained shall at all affect or modify the effect of any admission contained in the answer of the defendants nor the allegations in the amendments to the bill of complaint contained nor of the stipulations filed herein on September 15th, 1885, nor shall the same be construed as waiving the effect of the allegations in said answer relative to the sale of parts of said lands at public auction without foreclosure and at private sale, but the legal effect of such allegations shall be determined according to the import and significance of the said stipulation of September 15th, 1885, and the pleadings on which the same is based; and this stipulation does not conclude either party thereto from insisting, at the trial of said cause, on his right to the pleadings and issues and admissions in the same as evidence to sustain his side of the case when the same is by law and the usages of this honorable court made available for such purposes, and this stipulation shall not be considered as concluding the testimony of the parties to the same, but either party may take further depositions and testimony, introduce other testimony on points not included in this and former stipulation herein filed. Nothing in this stipulation heretofore contained shall be construed to mean that the defendants, or either of them, have waived the allegations in their answer concerning the alleged ownership of the land for which these defendants defend, but it is admitted by the stipulation that Pluma F. Cross, the mother of the defendants answering herein, was the owner of said lands, as in said answer alleged, and also that she signed the mortgage described in the pleadings in this cause as surety for the debts of her said husband and for no other purpose, as is fully alleged in said answer, nor is any matter or thing, or the legal effect thereof, waived by either party about which an agreement has been reached by the pleadings in this cause or embraced in any former stipulation herein filed.

(Signed) HENRY ACH,
Of Counsel for Complainant.
W. H. HOLMES,
Of Counsel for E. C. and Frank Cross.

Filed April 6th, 1886.

R. H. LAMSON, *Clerk.*

The deposition, being that of C. H. Lewis, is in these words (Record 107–110):

DEPOSITION.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON. IN EQUITY.

L. H. ALLEN, Complainant,

vs.

ELIZA O'DONALD and JONATHAN O'DONALD, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Francis E. Cross, his wife; Edwin C. Cross, P. May Wilson, and John T. Wilson, her husband; Frank Cross, a minor, heirs-at-law of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross, deceased, and John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, defendants.

Deposition of C. H. Lewis, a witness produced, sworn, and examined on behalf of the defendants, Edwin C. Cross and Frank Cross, at the city of Portland, in said district of Oregon, on the 2d day of April, A. D. 1886, before me, J. B. Thompson, a notary public in and for the county of Multnomah, State of Oregon, duly commissioned and sworn and residing in the city of Portland aforesaid—

The complainant appearing by Henry Ach, Esquire, his counsel, and the defendants, Edwin C. Cross and Frank Cross, appearing by their counsel, William H. Holmes.

And said parties consenting that said testimony of said witness should be so taken upon oral interrogations propounded to him, the said witness, having been by me first duly cautioned and sworn to testify the whole truth, in answer to the following questions did depose and say as follows:

Direct Examination by Mr. W. H. Holmes.

1 Question. Are you the C. H. Lewis impleaded with the other defendants herein?

Answer. I suppose I am.

2 Q. Does the partnership relations between you and L. H. Allen, the plaintiff herein, exist as heretofore?

(Objected to as irrelevant and immaterial.)

A. They do not.

3 Q. Are you pecuniarily interested in the result of this litigation?

(Objected to as irrelevant and immaterial.)

A. The indebtedness of Mr. Cross to Allen & Lewis was transferred to Mr. Allen some time ago, and my interest in the claim pecuniarily ceased at the time.

4 Q. Did you render Mr. Allen with a statement of the account charging him with the amount of this indebtedness?

A. I did.

5 Q. How much did you receive for your interest?

(Same objection as last above.)

A. I did not receive anything. I charged it to him against his interest in the business.

6 Q. How much did you charge him with and when?

(Same objections as last above.)

A. I can not tell you the exact date, but it was before this suit was commenced. The amount was forty thousand dollars.

7 Q. When the land or portions thereof was sold by the receiver you became the purchaser individually, did you not?

(Objected to as last above.)

A. Yes; some of them.

8 Q. Did you make this transfer to your partner, General Allen, in pursuance of a contract you had with him, or did he leave the matter to your guidance or discretion?

(Objected to as irrelevant, incompetent, and immaterial.)

A. He fully understood the matter, and it was done with an understanding with him.

9 Q. What was the purpose and object of making the transfer?

(Objected to as last above.)

A. The principal object was to get the matter settled between us.

10 Q. Who employed the firm of Fechheimer & Ach to foreclose the mortgage?

(Objected to as last above.)

A. I employed Mr. Fechheimer in the case, with the full consent and understanding with Mr. Allen.

11 Q. Did you so employ him before or after you transferred your interest to Mr. Allen?

(Objected to as last above.)

A. He was employed before and after the transfer and had charge of the case for at least ten years, and that, too, with an understanding with Mr. Cross.

12 Q. *Is it not a fact that one of the purposes of the transfer of the notes and mortgages in suit to General Allen, he being a citizen of California, was to make a case that could be tried in United States court?*

(Objected to as last above, because the witness has already stated how the transfer was made and for what purpose.)

A. *Well, we had that object in view at the time the transfer was made.*

13 Q. Are you familiar, Mr. Lewis, with the pleadings in this case?

A. I am not.

14 Q. Have you consulted with counsel for plaintiff and furnished them with data from which the pleadings were drawn?

A. Yes.

15 Q. Are you familiar with the circumstances of sale or sales of lands included in the original mortgages, as set

out in the amendments to the bill of complaint filed herein?

A. I know that there were some lands sold. Before those lands were sold they were surveyed and platted at the request of Mr. Cross. It was understood at the time the land was platted that all of that tract should be sold. Further sales were stopped at the request of Mr. Cross, as they would not bring satisfactory prices.

16 Q. You were interested in the mortgage at that time?

A. I was.

17 Q. *And consummated this arrangement with Mr. Cross whereby those lands were sold, as stated in the amendments to the bill?*

(Objected to as incompetent.)

A. *Yes.*

18 Q. By Mr. Cross you mean Thomas Cross, now deceased?

A. Yes.

19 Q. *Do you remember, Mr. Lewis, at whose suggestion it was that portions of those lands were offered at public sale on the fair grounds at Salem?*

(Objected to as immaterial.)

A. *It was at my urgent request for payment of the loan, and that plan was adopted after full consideration between us.*

20 Q. *Did you agree with Mr. Cross as to the time and manner of advertising the lands so proposed to be sold?*

(Objected to as immaterial and incompetent.)

A. *My impression is that he fixed the time and advertisements.*

21 Q. *And you consented to his terms?*

(Objected to as incompetent and immaterial.)

A. *I did; at least, made no objection.*

22 Q. By time do you mean the time of sale?

(Objected to as immaterial and incompetent.)

A. I do.

Cross-examination by Mr. Ach:

Q. These mortgages were assigned to Mr. Allen, were they not?

A. They were.

Q. State whether or not the transfer and assignment to Mr. Allen was not without reserve and bona fide and without collusion.

A. It was.

Q. When you state that suing in the Federal Court was in view, state whether or not that was not simply regarded as an advantage to Mr. Allen; and was not the closing out of the claim against Cross the real object and purpose of the transfer?

A. That was the only object. So far as carrying it into the Federal Court was concerned, that arrangement was made between Mr. Allen and Mr. Fechheimer.

Redirect:

Q. Mr. Lewis, will you please read direct question No. 12 and your answer thereto and state whether that answer is true or not?

(The witness here reads the question and answer.)

(Objection as immaterial and not proper redirect examination.)

A. 'Tis true.

(Signed) C. H. Lewis.

DECREE.

The court, after hearing the said cause, rendered the following decree, from which decree this appeal is brought (Record, 79):

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

L. H. ALLEN
vs.
ELIZA O'DONALD and JONATHAN O'DONALD, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Francis Cross, his wife; Edwin C. Cross; P. May Wilson, and John Wilson, her husband; Frank Cross, a minor, sued herein by Edwin C. Cross, his guardian *ad litem*, heirs-at-law of Thomas Cross and Pluma F. Cross, both deceased; Adelia Cross, widow of Thomas Cross, deceased; John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis. } No. 1,056.

July 19, 1886.

This cause was heard upon the bill and the amendments thereto, the answer of the defendants, E. C. Cross and Frank R. Cross, an infant, by his guardian, E. C. Cross; the replication thereto, the stipulation of the parties, the evidence, and the decree entered herein on January 20th, 1885, taking the bill as confessed by the defendants, Eliza O'Donald and Jonathan O'Donald, her husband; William F. Cross and Christina Cross, his wife; Caroline M. Wright and John G. Wright, her husband; James Cross and Francis E. Cross, his wife; P. May Wilson and John T. Wilson, her husband; Adelia Cross, widow of Thomas Cross; John G. Wright and Edwin C. Cross, administrators of the estate of Thomas Cross, deceased, and C. H. Lewis, and was argued by Mr. George H. Williams and Mr. Henry Ach, of counsel for the plaintiff, and by Mr. William H. Holmes, of counsel for the defendants, E. C. Cross and Frank R. Cross; on consideration whereof the court finds that the release in eighteen hundred and

seventy-six of eight hundred and sixty-two acres and forty-six one-hundredths of an acre of the land included in the mortgage mentioned in the bill herein was done in good faith and on a credit given said Thomas Cross on his debt to Allen and Lewis equal to the market value thereof; that under an order of this court made on May twenty-fifth, eighteen hundred and eighty-five, the receiver herein sold all the remaining lands included in the mortgage, as set forth in the bill and in the amendments thereto, except the lands of Pluma F. Cross, deceased, hereinafter described; that on November tenth, eighteen hundred and eighty-five, said sale was confirmed by an order of this court, and the proceeds thereof, amounting to the sum of forty-four thousand seven hundred and sixty-nine dollars and four cents, was applied upon the amount due upon the two notes secured by said mortgage; that there is now due and unpaid upon said notes the sum of thirty-six thousand four hundred and seventeen dollars and eight cents; that said mortgage executed by Thomas Cross and Pluma F. Cross, his wife, as in the bill alleged, is a valid and subsisting lien upon the lands owned by said Pluma F. Cross therein and hereinafter described; that before the commencement of this suit the notes and mortgage mentioned in the bill were duly indorsed and assigned to L. H. Allen, the plaintiff, and that within six years from the commencement of this suit a payment of interest was made on each of said notes by said Thomas Cross. It is therefore adjudged and decreed that unless within ten days from this date there shall be paid to the plaintiff the said sum of $36,417.08, with interest thereon from this date at the rate of ten per cent. per annum, together with his costs and disbursements herein, taxed at —— dollars, that then and in that case Mr. William B. Gilbert, one of the masters of this court, do proceed to sell, in manner and form as upon an execution issued

upon a judgment at law, all the right, title, and interest that the said Thomas Cross and Pluma F. Cross had at the date of the execution of said mortgage in or to the following described premises, to wit: a part of the donation land claim of David Leslie and wife, situate in township 7 S., of range 3 W., of the Willamette meridian, known as claim No. 45, commencing at a point in the south boundary line of said claim 6 chains and 25 links S., 89° 30′ W., from the southeast corner of said claim, running thence north 1° E., parallel to the east line of said claim, 8 chains and 5 links; thence E. ten chains and 83 links (the last 4 chains and 58 links of this line being along the south line of said land claim); thence N. 30′ E. 17 chains and 6 links; thence W. 35 chains and 7 links; thence south 2° and 30′ W. 25 chains and 30 links to the south line of the claim; thence north 89° and 30′ east along the south line of the claim 25 chains and 27 links to the place of beginning, containing 80 acres, more or less; also the donation land claim of F. S. Hoyt and wife, the same being notification No. 69 and claim No. 53, in township 7 S., of range 3 W., containing 131 acres, more or less, together with all the tenements, hereditaments, and appurtenances thereunto belonging; and that out of the proceeds of said sale said master shall first pay the costs and expenses of said sale; second, that he shall pay to the plaintiff the amounts found to be due him as aforesaid; third, if any balance remain he shall pay it into the registry of this court; and it is further ordered that if out of the proceeds of said sale there be not enough to satisfy the amount found due to the plaintiff that the plaintiff may, upon the coming in of the report of said master, apply to this court for a decree against the administrators of the estate of said Thomas C. Cross for the remainder.

(Signed) DEADY, J.

OPINION.

The opinion of the court below, by way of argument in support of its said decree, is to be found on pages 81 to 91, inclusive, of the record, and was filed July 19, 1886.

Immediately upon the rendering and filing of the decree and opinions *supra*, to wit, July 27, 1886, a motion for rehearing was interposed by counsel for E. C. and Frank Cross, which motion (Record 91–93) was in *hace verba* as follows:

MOTION FOR REHEARING.

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON.

L. H. ALLEN, Complainant,

vs.

ELIZA O'DONALD *et al.*, Defendants.

I feel constrained out of a sense of duty to my clients to file this their petition for a rehearing of the said cause. I do so from an earnest conviction that manifest error exists and omissions occur showing misapprehensions of the facts.

1st. The court assumes that no evidence was adduced to show an extension of time on the part of Allen & Lewis to Thomas Cross, and that the contention is that the execution of the trust deed to Mr. Lewis was tantamount to such extension. Now, the amendments to the bill of complaint allege that it was agreed by Mr. Lewis and Mr. Thomas Cross that this property should be sold at auction on the fair grounds, and that the day was fixed between them, and that some of the property was sold in pursuance of such contract. It was this agree-

ment to sell and subsequent acts in pursuance of the agreement which I contended was a contract for extension of time, and the consideration to uphold it was the trust deed and the subsequent moneys realized on the same.

Even though nothing passed as a consideration, it is enough that they acted on the arrangement. The time was extended in fact to the agreed time of sale. It would be an unjust imputation against Mr. Lewis to say he would not keep his word when he agreed that the sale at auction might take place at the time and in the manner specified. It was a valid agreement, treated and acted on as such by the parties. This is the theory upon which the case of Looner *v.* Wheelwright, 3 Sanford Chancery, 171, '2, was decided; and, again, Mr. Brandt is authority for the assertion that "if the parties act upon an implied agreement for extension of time, that will be sufficient." It is difficult to come to any other conclusion than that there was an extension of the time of payment under these circumstances, and it were idle to say that Mrs. Cross and her legal representatives were not bound by it. If she had been living at the time, or if her heirs had tendered the money on these mortgages pending the sale and had commenced to foreclose, she or they would be met with the answer that a new and different contract had been substituted for the old. Were it said that the contract was not legally binding the answer would be that it was binding in morals, and that no one but Mr. Lewis could be permitted to take advantage of it; she could not. The court having based its opinion concerning the matter of limitation upon the fact that the payment made by Cross kept the debt alive as to his wife, we have to say Mrs. Cross formed no debt of her own. She simply entered into a collateral contract, pledging certain of her property to the payment of her husband's debt to Allen & Lewis.

Mr. Angel on Limitations, section 250, says: "But it is evident that a payment made by one of several liable *alieno jurie* can not raise an implied promise by them all, and that where the relationship of the parties to a contract is collateral and there is no *aggregatio mentium* neither can vary or affect the liability of the other. Where the maker of a promissory note of more than six years' standing died insolvent he and a guarantor of the note, it was held, never were jointly liable, and the undertaking of the guarantor being independent of and collateral to that of the maker, the allowance by him as commissioner of the maker's note after his decease as a valid claim against the estate implied no promise to pay the debt. Both maker and guarantor stand equally independent to each other. If A guarantees to B the performance of any contract he may make with C and six years elapse after the contract between B and before the bringing of suit against A upon his guaranty, no acknowledgment by C subsequent to the contract can take the case out of the statute as to A. A made an engagement by himself and was in no kind of partnership.

There can be no question that a party attempted to be charged as the indorser of a negotiable note may be protected by the statute, notwithstanding the maker may have made a direct and positive promise within six years to pay the same, and it has been held expressly that where an acknowledgment was made by an accommodation acceptor within six years of his liability to the payee it was insufficient to deprive the drawer of the protection of the statute. It has been considered an extravagant extension of the general rule to make a mere payment of a sum of money to the indorsee of a note by one of two joint makers sufficient to render the other liable, as the money might have been paid on some other account. The other party must expressly acknowledge the payment on account of the note.

The learned author seems to have taken his argument from the case of Gardner *v.* Nutting, 5 Greenleaf (Me.), 140, where the principle was squarely held. It was held by Deady, J., in Eubanks *v.* Leveridge, 4 Sawyer, 279, that these remedies are distinct. It follows, said the judge, that the remedy upon the mortgage is barred irrespective of that upon the note. The remedies are not identical nor necessarily coexistent. The same decision recites the long established doctrine that the mortgage contract is only collateral to the note which it was made to secure.

Very respectfully submitted,

W. H. HOLMES,
E. C. Cross and Frank Cross.

(Endorsed:) Filed July 27, 1886. R. H. Lamson, clerk.

The opinion of the court below on the rehearing adhering to decree and opinion originally rendered, is found on pages 94 to 98, inclusive, of record.

ASSIGNMENT OF ERRORS.

1. The court erred in holding that the foundation of the suit in this case, so far as the appellants were concerned, was the notes in this case, and not the mortgages.

2. The court erred in holding that payments of interest on said notes by Thomas Cross, the father of the appellants, barred the operation of the statute of limitations as to the deceased mother, for whose property they defend.

3. The court erred in holding that the suit herein is not barred by the statute of limitations so far as the property in litigation is concerned.

4. The court erred in holding that the lien of the respondent on the land in controversy was not lost by the laches of the said respondent and his grantor.

5. The court erred in holding that the transfer of the interest of C. H. Lewis to his partner, the respondent, was *bona fide*, and not merely colorable, and for the purpose of conferring jurisdiction on the Federal Court.

6. The court erred in holding the notes mentioned in the complaint to be negotiable *according to the law merchant* within the meaning of the act of Congress of March 3d, 1875.

7. The court erred in holding that it had jurisdiction of the subject-matter of the suit and the parties also.

8. The court erred in holding that a conveyance to C. H. Lewis, one of the creditors, by Thomas Cross, the principal debtor, of the equity of redemption in the mortgaged premises, and of his interest as tenant by courtesy in the lands of his deceased wife, and the surrender to Lewis of the possession of the same, with right to manage, farm, let, receive the rents and profits thereof, and sell the same, or any portion thereof, at either public or private sale, and a consummation of such agreement and a sale of a portion of the lands of Thomas Cross included in said mortgages at public auction without foreclosure, and other portions thereof at private sale by said Thomas Cross and C. H. Lewis, and the release of the mortgage liens on the same, did not work a change of the contract by which the surety became bound, and that the surety was not thereby discharged nor her lands released from the lien of the said mortgages.

9. The court erred in holding that the contract entered into between the respondent and C. H. Lewis, on the one part, and Thomas Cross, deceased, on the other part, as fully disclosed by the bill of complaint, answer, stipulations of the parties, and evidence, especially the former, whereby the lands of Thomas Cross embraced in the two

mortgages, including his interest as tenant by courtesy in the mortgaged lands of his deceased wife, were conveyed to C. H. Lewis, one of the creditors, by Thomas Cross, the principal debtor, and possession thereof surrendered to Lewis with right to manage and control the same, receive the rents and profits thereof, let, and finally sell the same at public auction at a day agreed upon, and in pursuance of which contract said mortgaged lands were advertised for sale on the State fair grounds, on October 14, 1876, the time agreed upon, and large portions of them on that day there sold at public outcry—other portions being subsequently sold at private sale—and all without the consent of Pluma F. Cross, the surety, or her legal representatives, was not supported by any sufficient consideration, and that the said agreement and the actual sale of said land covered by said contract, and in accordance with its terms, did not imply an extension of time, and that the lands of the surety were not thereby discharged.

10. The court erred in holding that Pluma F. Cross, a married woman, had any power under the constitution and statutes of the State of Oregon, as they existed at the date of the execution of the mortgages in question, to bind her separate property as security for the husband's individual debt, and in failing to hold that her act in signing such mortgages was void and did not bind her separate estate.

ARGUMENT.

The foregoing assignments will be discussed in the inverse order in which they are stated *supra*.

Assignment No. 10.

Had a married woman power under the constitution and statutes of Oregon, as they existed at the date of the

execution of the mortgages in question, to bind her separate property as security for her husband's debt? It is respectfully submitted she had not, and for the following reasons:

POINT NO. I.

"A married woman can not, unless enabled by statute, become surety for her husband or a stranger."

Brandt on Sur. and Guar., sec. 4;
Firemen's Ins. Co. *v.* Cross, 4 Robinson, La., 508;
Gasmon *v.* Cruger, 7 *Id.*, 60.

"She can not bind herself, nor her separate property, either at law or in equity by such a contract. The contract is *absolutely void at law*, and *equity will not charge her separate estate where she has received no benefit.*" *Id.*, and

Yale *v.* Dederer, 18 N. Y., 265;
Perkins *v.* Elliott, 8 C. E. Green, N. J., 526.

"In many States, by statute, a married woman may hold, manage, and contract with reference to her separate property the same as if she were unmarried. She can not, however, by virtue of such a statute *become a surety.* The intention was, by such statutes, to remove her disabilities *for her interest*, and not to enable her to contract onerous obligations from which she derived no benefit."

Id. Also,
Athol Machine Co. *v.* Fuller, 107 Mass., 437;
West *v.* Laraway, 28 Mich., 464.
Brandt on Sur. and Guar., sec. 4.

"A married woman can not by her own act enlarge her capacity to convey, or bind her separate estate, and is not estopped by her covenants.

Bank of America *v.* Burns, 101 U. S. 240.

POINT II.

THE CONSTITUTION OF OREGON.

Sec. 5, Article XV, Constitution of Oregon. General Laws of Oregon, 1843–1872, page 35, provides as follows:

"The property and pecuniary rights of every married woman, at the time of marriage, or afterward, acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband, and laws shall be passed providing for the registration of the wife's separate property."

POINT III.

Oregon Statutes Relating to Married Women in Force When the Two Mortgages Were Executed.

The only statutes of the State in existence at the time of the execution of these mortgages in any manner relating to the subject of the power of a married women to make contracts, dispose of her separate property, or act as a *feme sole* while living with her husband were the following:

"The property, either real or personal, acquired by any married women during coverture, by her own labor, shall not be liable for the debts, contracts, or liabilities of her husband, but shall in all respects be subject to the same exemptions and liabilities as property owned at the time of her marriage, or afterwards acquired by gift, devise, or inheritance."

General Laws of Oregon, 1843–1872, page 663, sec. 4:

"A husband and wife may, by their joint deed, *convey* the real estate of the wife, in like manner, as she might do by her separate deed if she was unmarried; but the wife *shall not be bound by any covenant contained in such joint deed.*"

General Laws of Oregon, 1843–1872, page 515, sec. 2:

"A married woman may, by will, dispose of any real

estate held in her own right, subject to any rights which her husband may have as a tenant by the courtesy."

Id., page 788, sec. 3.

That it was the intention of the legislature of the State of Oregon, prior to 1878, that married women in that State should not have the right generally, to contract, either as to her own separate property or otherwise, or to act generally or at all, as a *feme sole*, is made clearly manifest by the following provision in the statute authorizing her under certain circumstances—the abandonment by her husband, and after an adjudication of the fact in the county court—to enter into contracts as to her separate property *as if she were a feme sole*. The provision is as follows:

"When any married man residing in this State shall abandon his wife without making suitable provision for her support, and absent himself from the State for a period of one year, the county court of the county in which such wife shall reside, may, upon her petition setting up the facts of such abandonment, verified by her own oath, summarily proceed to hear the said petition and adjudge the fact as to such abandonment, which adjudication shall be conclusive as to such fact as to third persons; and if such abandonment shall be adjudged thereupon, such married woman, *during the absence of her husband*, may in all respects contract in relation to, sell, convey, and deal with her separate property, real and personal, in the same manner *as if she were a feme sole*." * * * *

General Laws of Oregon, 1843, 1872, sec. 5, page 663.

Since these mortgages were executed, the legislature of the State of Oregon, in act of October 21, 1878, conferred upon married women divers powers, which, under former legislation, she did not possess. See sections 2997 and 2998, Hill's Annotated Laws of Oregon, page 1,355.

"Sec. 2997. Contracts may be made by a wife and liabilities incurred, and the same enforced by or against her, to the same extent and in the same manner as if she were unmarried."

"Sec. 2998. All laws which impose or recognize civil disabilities upon a wife, which are not imposed or recognized as existing as to the husband, are hereby repealed; *provided*, that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law; and for any unjust usurpation of her property or natural rights, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress that the husband has."

It will be perceived that under these several provisions of the constitution and statutes, property acquired by a married woman, either before or after coverture, by gift, devise, or inheritance, as well as property, either real or personal, acquired by a married woman during coverture by her own labor, can not be made liable for the debts, contracts, or liabilities of her husband.

It is admitted by the pleadings in this case that the land in question was the *separate property of the wife*, Pluma F. Cross, and that she signed the mortgages described in the pleadings *solely* as security for the debts of her husband. (See answer, record, 28; also stipulation, record, 77.)

It must, under these concessions and in the absence of any claim to the contrary, be presumed that the property in question was acquired in some one of the ways mentioned in the constitution and laws *supra*, and that it therefore comes within the folds of whatever protection is afforded by them.

But in any event, it will be seen from what follows, that a married woman had no such power to contract under the laws of Oregon at the time these mortgages were executed as would enable her to bind her separate

property as security for her husband's debt, wholly irrespective of the question as to the *manner* in which such property was acquired, so long as it is conceded, as it is in this case, that it was her *separate property.*

POINT IV.

It will be seen from the foregoing statutory provisions a married woman in the State of Oregon, in 1871–2, had no power to act as a *feme sole.* Aside from the fact that she was inhibited both by the provisions of the constitution and statute from incumbering her separate property for the payment of her husband's debts, she had no power to make any binding contract save and except that she could by joining with her husband in a deed *sell* and *convey* her separate property. This it will scarcely be insisted would include a power to pledge or hypothecate her separate property as security for the payment of her husband's debts, even were there no positive restrictions to the contrary.

POINT V.

But it may, and in all probability will, be said by counsel for appellees that the Supreme Court of the State of Oregon has settled this question; that it has become a *rule of property* in the State, and that it is binding on this court.

It is conceded that if after careful consideration by that court, the point having been presented and argued, the court has settled the question differently from that for which contention is now had, and has adhered to such ruling until it can properly be said the ruling has the *force of statutory law* and has become a *rule of property* in that State, this court would perhaps feel bound by it. (Rev. Stats., sec. 914, and Atlantic and Pacific R. R. Co. *v.* Hopkins, 94 U. S., 11.) Although as this

involves not only the construction of *constitutional* and *statutory* provisions, but also the *construction* or *validity of a contract*, we have some pretty high authority trenching very strongly on this rule, as, for instance, in Butz *v.* Muscatine, 8 Wall., 575, wherein Mr. Justice Swayne, in delivering the opinion of this court, said:

"This court determines for itself the construction of a contract without reference to the previous adjudications of the State courts upon the subject."

Also Burgess *v.* Seligman, 107 U. S., 20, and note citing authorities.

Point VI.

But what are the *facts* in reference to the rulings of the Supreme Court of the State of Oregon on this question?

First. Not until years subsequent to the execution of these mortgages by Pluma F. Cross had the question as to the power of a married woman to bind her separate property for the debts of her husband been mooted in that court. And in so far as reported cases are concerned, there has never been *any consideration* given to the question by that court, although in *two* reported cases, and *only* two, that court has *assumed* that such power exists. And in the one case the opinion recites that the question had been decided in a certain case named, but no such case is to be found in the Oregon reports, nor is it to be found among the list published in the reports of cases tried and not reported: otherwise I am at fault in my investigations.

The only two cases, so far as my investigations go, wherein the question is at all referred to, is in Moore *v.* Fuller, 6 Oregon, 274, decided at December term, 1873, and Gray *v.* Holland, 9 Oregon, 513, decided at October term, 1881.

In the former case the court, McArthur, Justice, *assumed* the question had been previously decided, and dismissed it by saying: "It is unnecessary to examine this question, for we have decided that a married woman has a right to sell or mortgage her separate property for the payment of her husband's debts." (Allen & Lewis *v.* Harker *et al.*, December term, 1876. Opinion by Mr. Justice Boise).

This latter case, however, is not reported, nor is there any other reference to it in any of the reports.

In Gray *v.* Holland, 9 Oregon, *supra*, the court again simply says, Lord, Chief Justice: "It has been decided in this court that a married women has a right to sell or mortgage her separate property for the payment of her husband's debts," and refers to the case of Moore *v.* Fuller, 6 Oregon, *supra*.

This, then, is the *manner* and the *only manner* in which this important question has been determined in the Supreme Court of that State. So far as appears, the question as to the *proper construction* of the provisions of the *constitution* and *statutes* of the State has *never* been argued or considered by the Supreme Court of the State. One justice, under a misapprehension, perhaps believing the question had been determined previously in a certain case by another justice in a case not reported, when possibly he was in entire error, and no such question had, perhaps, ever been in the case, even if there ever was such a case before the court, *assumes* the question so settled; while on the other hand, it must be conceded that if it ever was so held, it was in a case so unimportant as not to be worthy of a place among the reported cases, nor yet among the reported list of cases decided but not reported.

It is respectfully submitted these *facts* do not bring the question within the rule where this court will follow the ad-

judications of the highest judicial tribunal in a State where the settled decisions of such tribunal in relation to a State statute, local in its character, have become rules of property.

This court should be satisfied that the question had been carefully considered and determined by the State court, and not merely that such court should have *assumed* that it had been so determined, as seems to have been the case here. Again, simply deciding in the *abstract* without giving any reason therefor that a married woman has power to pledge her separate property as security for the debts of her husband generally, is one thing; while carefully considering, and judically construing certain important *constitutional* and *statutory* provisions of a State relating directly to the subject, and determining whether under these, and giving reasons therefor, a married woman can do this thing, is quite another and different thing. It is the latter, it is respectfully submitted, this court should be able to see in the judicial records of a State court before it should feel bound, or hesitate to decide for itself as to the *very right* of the question.

In case, Town of Venice *v.* Murdock, 92 U. S., 501, this court, opinion by Mr. Justice Strong, said in referring to the binding effect on this court of certain decisions of a state court:

"They assert general principles, to wit, that persons empowered to borrow money and give bonds therefor for the purpose of paying it to an improvement company, are not authorized to deliver the bonds directly to the company * * *. They assert *several propositions*. They do not assert *that the statute so declares*, or that *such is even its implied requisition*. There is, therefore, before us no such case of the *construction of a State statute by State courts* as requires us to yield our convictions of the right, and blindly follow the lead of others, eminent as we freely concede they are."

So, in the case under consideration, the most that can be said of the decisions of the State court is that they *assert* a *general proposition;* they *assume* a certain thing; they do not assert even that the *construction of the constitution or the statute* is thus or so. There is not a single reference in any reported case to the constitutional provision or the provisions of the statute relating to the right or power of married women to bind their separate property as security for the husbands' debts; much less is there any attempt to construe them, nor is there a solitary case, it is submitted, wherein the Supreme Court of that State has held that a married woman had any power under the statutes of that State, as they existed when these mortgages were executed, to contract generally, or act as a *feme sole.* There is, therefore, it is respectfully submitted, before this court in this case "no such case of the construction of a State statute by State courts" as requires this court to yield their "convictions of the right, and blindly follow the lead of others" however eminent they may be conceded to be.

It is respectfully insisted, therefore, the question as to the power of Pluma F. Cross to execute the mortgages in question is an open one before this court, and it is further insisted she had no such power, and therefore her act was *void* and *no lien ever attached to her property.*

Assignments Nos. 8 and 9.

These two assignments of error will be considered together.

POINT I.

"But, assuming a married woman may under the laws of Oregon pledge or mortgage her separate property for her husband's debt, it is respectfully submitted that if she does so, such property occupies the position of a surety

or guarantor, and will be discharged by anything that would discharge a surety or guarantor who was personally liable."

Brandt on Sur. and Guar., sec. 22;
Jones *v.* Reardon, 11 Md., 465;
Denison *v.* Gibson, 24 Mich., 187;
Agnew *v.* Merritt, 10 Minn., 308;
Spear *v.* Ward, 20 Cal., 659;
Niemcewiez *v.* Gohn, 3 Paige, ch. 614;
Smith *v.* Townsend, 25 N. Y., 479;
Bank of Albion *v.* Burns, 46 N. Y., 170;
Wilcox *v.* Todd, 64 Mo., 388.

"When a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety."

Brandt on Sur. and Guar., sec. 22;
Wheelwright *v.* De Peyster, 4 Edw., Ch. R., 232;
Loomer *v.* Wheelwright, 3 Sandfords Ch. R., 135;
Hawley *v.* Bradford, 9 Paige, 200;
Spear *v.* Ward, 20 Cal., 674;
Gray *v.* Holland, 9 Oregon, 513;
Huntington *v.* Huntington, L. Cases in Equity, 577, 3d Am. Edition.

Mr. Justice Field, in Spear *v.* Ward (*supra*), said:

"And her character as surety is not affected by the fact that the debt secured is the debt of her husband. With respect to such debts she holds her property as absolutely free as though she were a *feme sole*. As surety for the debt of her husband she is entitled to all the rights and privileges of that character."

It will be observed, by noticing the admissions in the pleadings, the direct allegations of the appellee's complaint, and the agreements entered into in the stipulation above set out, that the land for which the appellants herein

contend belonged to and was the *separate property* of their deceased mother, and that she hypothecated such lands to secure the payment of her husband's debt *as surety* for him, *and for no other purpose.*

Point II.

The question raised, therefore, by this assignment is as to the rights and liabilities of a surety. In other words, was there such an extension of time by the principals to these mortgage contracts, or such change in the nature of the obligations entered into by Pluma F. Cross as security for her husband as will operate to release her lands from the original obligation?

It is respectfully insisted the answer to each of these questions must be in the affirmative.

Point III.

No principle in the law, we take it, is better settled or more uniformly adhered to by both Federal and State courts, than that an extension of time to the principal creditor by an agreement between the creditor and principal debtor, as also any change in the nature of the obligation itself based on a consideration, and without the consent of a surety, discharges such surety from his obligation as such.

Miller *v.* Stewart, 9 Wheaton, 234;
Reese *v.* The United States, 9 Wallace, 21;
Billington *v.* Wagoner, 33 New York, 31;
Place *v.* McIlvaine, 37 N. Y., 96;
Bangs *v.* Alcott, 10 Paige's Ch., 11;
Dobbin *v.* Bradley, 17 Wend., 422;
Brickhard *v.* Brown, 5 Hill, 640;
Myers *v.* Wells, *Id.*, 463;
Brandt on Sur. and Guar., secs. 301, 304, and note; 12 Mich., 366;

Hubbard *v.* Guney, 64 N. Y., 458;
Mayhew *v.* Boyd, 5 Md., 102;
Fellows *v.* Prentiss, 3 Denio, 512o;
Bangs *v.* Strong, 7 Hill, 250;
Martin *v.* Thomas, 24 How., 315;
People *v.* Brown, 2 Douglass (Conn.), 13;
Dixon *v.* McPherson, 3 Grant's Chancery Appeal Reports (Canada), 185;
Hawkins *v.* Humbel, 5 Colwell Tenn. Reports, 531;
Marquam *v.* Tandon, 41 N. Y., 241;
Wheeler *v.* Newbold, 16 N. Y., 396.

The reason for the foregoing rules is very apparent. The creditor is the trustee of the fund which he has in his hands for the payment of the debt, and the surety should have the right at all times to pay the obligation and be subrogated to the rights of his principal, and it is very obvious if an extension of time is had without his consent he could not be placed in the same position that he was at the time he became obligated. All authorities, both in the reports and text-writers, follow the reasoning in the case of Miller *v.* Stewart, 9 Wheat., 234.

That eminent jurist (Justice Story), in delivering the opinion of the court in the case last above referred to, uses language which is both clear and comprehensive. He says:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of the surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound, and no further. *It is not sufficient that he may sustain no injury by the change in the contract, or that it may even be for his benefit;* he has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and the variation is made, it is fatal."

In Martin *v.* Thomas *et al.*, 24 How., 316 (*supra*), the foregoing language of Mr. Justice Story is quoted *in extenso* and approved by this court, Mr. Justice McLean delivering the opinion.

The case of Reese *v.* The United States, 9 Wallace, 21 (*supra*), decided in 1869, was one wherein the condition of a recognizance of bail in a criminal action pending in a circuit court of the United States, provided that the party held to bail should appear for trial at the next regular term of the court and *at any subsequent term thereafter*.

A stipulation was entered into, however, between the attorneys of the principals, the United States as prosecutor, and the persons indicted, and entered in the minutes of the court, postponing the trial until the determination of certain cases pending in another court, and which carried the case beyond the first subsequent term after the next regular term of the court convening after the date of the recognizance—this stipulation, moreover, being without the knowledge and consent of the surety. The action was on the recognizance, the indicted party having failed to appear when the case was subsequently called at the time to which it was postponed. The surety on the bond defended on the plea that the stipulation postponing the trial operated to release him.

In deciding the case which came here on error to the circuit court of the United States for the district of California, this court, Mr. Justice Field delivering the opinion, held: First, that the latter clause in the condition of the recognizance, reading "*at any subsequent term thereafter*," should be construed to mean that the party should appear at any subsequent term which might follow *in regular succession* in the course of business of the court, and *not* at any distant future term to which either party might be disposed to postpone the trial without reference

to any intervening term. And, *secondly*, that the stipulation to postpone the trial and to which the surety was not a party, was inconsistent with the condition of the recognizance, and that it released the principal from the obligation to appear at any such subsequent term to which the case was thrown by the stipulation, and hence the surety was not bound.

Mr. Justice Field, in delivering the opinion, said:

"The stipulation to postpone the trial until after such final disposition was inconsistent with the condition of the recognizance. It released Limantour from the obligation of appearing at any subsequent term following the then next term in regular succession. It substituted for it an agreement that he need not appear at any such subsequent term, but only at such term as might be held after the happening of an uncertain and contingent event. The stipulation, in other words, superseded the condition of the recognizance."

So, in the case at bar, the stipulations and agreements between the creditor and debtor, Messrs. Lewis, representing Allen & Lewis, and Cross, and to which neither the surety, Mrs. Pluma F. Cross, who was then dead, nor her minor heirs and representatives, the appellants herein, were parties, and by which new, strange, and different conditions were substituted for those contained in the mortgages, first by a grant of extension of time to the principal debtor, a forbearance to foreclose on the part of the creditor, all in consideration of the receipt of a deed of conveyance therefor, and being permitted to take not only actual possession of the debtor's property and manage, use, and control the same, receiving the rents and profits thereof, but finally to parcel off and divide the same, selling portions thereof at *private* sale, and other portions at a *public* sale in the *distant future at a date agreed upon* by the creditor and debtor, all proceedings to foreclose, or in any other manner collect the

debt from the principal debtor, to be suspended in the meantime.

Nor can it be said that the doctrine enunciated by this court in this case (9th Wallace, 21, *supra*) is only applicable to sureties on recognizances, and that the rule is different in the case of sureties on notes, bonds, mortgages, or other commercial contracts. This whole question was thoroughly considered, and this court held that while in *many respects* the rights and liabilities of sureties on recognizances are different from those of sureties on ordinary bonds or commercial contracts, in respect to the limitations of their liability to the precise terms of their contract and the effect upon such liability of any change in those terms, without their consent, their positions are similar.

In announcing the opinion of this honorable court in the case last cited, Mr. Justice Field makes use further of the following very logical and cogent argument:

"It is true the rights and liabilities of sureties on the recognizance are, in many respects, different from those of sureties on ordinary bonds or commercial contracts; the former can, at any time, discharge themselves from liabilities by surrendering their principals and they are discharged by his death. The latter can only be released by payment of the debt or performance of the acts stipulated, but in respect to the limitations of their liability to the precise terms of their contract, and the effect on such liability of any change in those terms, without their consent, their positions are similar, and the law upon these matters is perfectly well settled. Any change in the contract on which the sureties made by the principal parties to it, without their consent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, *or even that it may be of advantage to the sureties.* They have a right to stand upon the very terms of their undertaking."

Mr. Sargent, in his very able brief filed in this court in Miller *v.* Stewart, 9 Wheaton, *supra*, and whose views of the law were adopted by this court in that case, in discussing this general question of the rights and liabilities of sureties, says:

"It is no answer to a surety to say that the alteration in the obligation is not material or that the surety is not injured by it. He has a right to determine for himself whether he will or will not consent to the alteration; whether *he thinks* it material or immaterial. Suppose he had been consulted and refused his consent, no matter from what motives. Not consulting him is at least equivalent to a refusal. Who can tell what considerations might have *justly* influenced him? But the great objection to *any* latitude is this, that if the narrow limits defined by numerous and uniform decisions be not adhered to, there will be no limit at all. The limit is this: No power of man or circumstance can alter your engagement. You know exactly the extent of the engagement you enter into. There will be no equity against you, no intendment or legal construction. A surety can not be held beyond the *precise terms* of his agreement. It is upon the basis thus established that suretyship stands, and it would not stand without it. *It is a needful, but it is always a perilous undertaking; and its perils most frequently overwhelm those whom one could wish to see saved—the generous and the humane. It can not be necessary or politic to increase its dangers.*"

Can it be truthfully said that the obligation of Pluma F. Cross as surety for her husband is, under the mortgages as she executed them, precisely the same as it would have been had the deed of January 22, 1876, from Cross to Lewis, and the agreement between Cross and Lewis as to the delivery of the possession of all the property to Lewis, the authority given to him to rent, manage, incur expenses in such management, postpone foreclosure, sell at private and public sale, cut off all statutory rights of redemption, *all* been incorporated in and made a part of

the original arrangement under which she became surety? Most assuredly not. "The reason is," as stated by Mr. Justice Story in Miller *v.* Stewart, 9 Wheaton, *supra*, "that the deed is no longer the same. The alteration makes it a different deed; it speaks a different language; it infers a different obligation. It must then take effect as a new deed, and that can only be by the consent of the party bound by it."

In Billington *v.* Wagoner, 33 New York, 31, the court, Justice Davies, said:

"It is incontrovertibly settled by abundant authority that the giving of time to the principal without the consent of the surety discharges and releases the latter." (Gohn *v.* Niemcewiez, 11 Wend., 312; Chester *v.* Kingston Bank, 16 N. Y., 326; Smith *v.* Townsend, 25 N. Y., 479.)

The doctrine on this subject is clearly laid down in Reese *v.* Berrington (2 Vesey, Jun., 540) by the Lord Chancellor, and that case has frequently received the approval of the courts of this State. He said:

"There should be no transaction with the principal debtor without acquainting the person who has a part interest in it. The surety only engages to make good the deficiency. It is the clearest and most evident equity not to carry on any transaction without the privity of him who must necessarily have a concern in every transaction with the principal debtor. You can not keep him bound and transact his affairs—for they are as much his as your own—without consulting him. You must let him judge whether he will give that indulgence contrary to the nature of his engagement."

Bangs *v.* Alcott, 10 Paige's Ch., 11.

Brandt in his treatise on suretyship and guaranty, sec. 296, says:

"When the obligation of the surety is for the debt of the principal, if the time of payment is without the consent of the surety, by a binding agreement between the

creditor and principal, extended for a definite time, the surety is discharged. The reason is, that the surety is bound only by the terms of his written contract, and if those are varied without his consent it is no longer his contract, and he is not bound by it. It therefore follows that the fact that the principal is insolvent, or that the extension would be a benefit to the surety if he remained bound, makes no difference in the rule. Moreover, the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment. As to this rule there is no conflict of authority among well considered cases."

In Mayhew *v.* Boyd, 5th Md., *supra*, the court, Mason, Justice, said:

"Any dealings with the principal debtor by the creditor which amount to a departure from the contract by which a surety is to be bound, and which *by possibility might* vary or enlarge the latter's liability without his assent, discharges the surety."

The case just quoted, Mayhew *v.* Boyd, is directly in point. There notes were indorsed by sureties, and the principal at the same time executed a chattel mortgage by the terms of which the mortgaged property was to be sold *only* on default of the principal in paying the notes at maturity. The first note becoming due and being dishonored, by consent of all parties a new one was substituted in its place. After the maturity of the dishonored note, but before the new one or any of the others became due, the creditor, with the assent of the principal, sold the property and applied the proceeds to pay the substituted note and the note next due. Held, that the sureties were discharged by the sale of the property. The property in that case, as in the case at bar, was *sold contrary to the terms of the mortgage*, and the court grounded its judgment upon the departure from

the terms of the original contract by which the surety became bound, rather than upon the extension of time.

In Bangs *v.* Strong, 7 Hill, N. Y., the court, Bronson, Justice, after reciting an agreement for extension of time in that case, said:

"This agreement was made between the creditor and the principal debtor, without the consent of the surety. Where time is thus given to the principal debtor by a valid agreement which ties up the hands of the creditor, though it be but for a single day, it is quite clear that the surety is discharged. The principal is the same whether the time be long or short. *The creditor must be in such a situation that when the surety comes to be substituted* in his place by paying the debt he may have an immediate right of action against the principal. If that right can be postponed for a single day it may be for a month or a year."

In discussing this question the court, in Fellows *v.* Prentiss, 3 Denio, 521, said:

"So careful of the rights of sureties are the courts, that if the benefit of his right of subrogation has been impaired by the creditor, even by negligence, as if collateral securities are given up or lost by neglect, the surety is discharged."

When a payee in a note takes a higher, better, and new security for its payment, the surety or guarantor becomes *ipso facto* discharged from his liability.

1 Mason's Rep., 191;
4 Peters' Con. Rep., 458.

In the case at bar the creditors clearly obtained a *higher*, *better*, and *new* security, as under the original contract they simply held two mortgages on the same property with right to the possession of premises, the right to rents and profits, and power to obtain payment on notes, *all* subject to postponement until after foreclosure

by suit in court and public sale of property, and that subject to right of redemption; whereas, under the new arrangement, he comes into *immediate* possession, is spared cost and delay of foreclosure; is entitled to rents; can lease, manage, and sell at both *public* and *private* sale, with all right of redemption cut off. Because it was considered by Mr. Lewis a *higher* and *better* security is the reason he was willing to, and did agree to, and kept his agreement, extend time of payment from January 22 to October 14, 1876.

Point IV.

But again, the rule is well settled that the undertaking of a surety is to receive a *strict interpretation*, and courts of equity adhere to this rule.

Miller *v.* Steward, 9 Wheat., 703;
Dobbin *v.* Bradley, 17 Wend., 425;
Birkhead *v.* Brown, 5 Hill, 641;
Mayhew *v.* Boyd, 5 Md., 103;
Adams *v.* Jones, 12 Pet. Rep., 207;
Mansum *v.* Bullus, 16 Pet. Rep., 537;
Kent's Com., 3, 124, and notes;
Fellows *v.* Prentiss, 3 Denio, 521.

Mr. Justice Story, in Miller *v.* Stewart, *supra*, in adverting to and sanctioning this rule of interpretation, says:

"And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness.

"The class of cases which have been cited at the bar, where persons have been bound for the good conduct of clerks of merchants and other persons, illustrates this position. The whole series of cases, from Lord Arlington *v.* Merrick (2 Saunders, 412) down to that of Pearsall *v.* Summersett (4 Fount, 593), proceed upon the ground *that the undertaking of the surety is to receive a strict interpreta-*

tion, and is not to be extended beyond the fair scope of its terms."

In Bacon *v.* Chesney, Lord Ellenborough said:

"The claim, as against a surety is *strictissimi juris*, and it is incumbent on the plaintiff to show that the terms of the guaranty have been strictly complied with. I have met no case which sanctions a different doctrine."

Dobbin *v.* Bradley, 17 Wend., 425.

In Mauran *v.* Bullus (16 Pet. Rep., 537), Mr. Justice McLean, in discussing this subject, said:

"Generally all instruments of suretyship are construed strictly, as mere matters of legal right."

Chancellor Kent says:

"The claim against a surety is *strictissimi juris.*"

Kent's Com., vol. 3, 124.

In Buckhead *v.* Brown (5 Hill *supra*), Bronson, Justice, said:

"The doctrine is a familiar one that a surety can only be charged when the case is brought within the very terms of his contract. What may be thought a *substantial* performance on the part of the creditor will not answer. * * * *Courts are not at liberty to speculate upon the question whether the surety has or has not been injured by a departure from the terms of his contract.*"

POINT V.

It is further well settled that it is not necessary that any *express agreement* to extend the time of payment should be shown. An agreement for an extension may be and often is implied from the *circumstances* or *acts of the parties*, and if there is *any* consideration moving

to the creditor, the surety will be released, *even though he is not injured thereby.*

Hubbard *v.* Gurney, 64 New York, 459;
Brandt on Sur. and Guar., secs. 301–304 and cases cited;
Mayhew *v.* Boyd, 5 Md., 102;
Durkee *v.* Rapp, 67 N. Y., 464;
Brooks *v.* Wright, 13 Allen, 72;
Place *v.* McIlvaine, 37 N. Y., 96;
Myers *v.* Wells, 5 Hill, 463;
Bangs *v.* Strong, 7 Hill, 250;
Fellows *v.* Prentiss, 3 Denio, 512.

It is respectfully submitted that the acceptance of the deed by Lewis representing the creditor of the mortgaged premises, and the taking possession of such premises, making sales of same at public and private sales, were acts in and of themselves which operated to suspend the immediate right of action, either at law on the notes or in equity for the purpose of foreclosure, and were acts which *ipso facto* operated a release of the surety. (Hubbard *v.* Guney, 64 New York, 467.)

The principle is well settled that where the holder of a promissory note takes a new note from the debtor, payable at a future day, he suspends the right of action upon the original demand until the maturity of the last-mentioned note, and the surety upon the same not assenting thereto thereby becomes discharged from liability.

Fellows *v.* Prentiss, 3 Denio, 512;
Place *v.* McIlvaine, 38 N. Y., 96.

Nor is it necessary in such a case that the old note should be surrendered to render the implied contract extending the time valid and effective. *Ibid.*

But in any event it is confidently maintained that the listing of these lands for sale at public and private sale,

after survey and division of same into 40-acre parcels, fixing a certain time and place to expose them to sale, advertising them in pursuance of such agreement and action of the parties for sale publicly at the time and place agreed upon, and actually selling them or a portion of them at such time and place, constituted such acts and agreements from which, in the absence of any express stipulation to the contrary, a contract to extend time to the principal creditor to that date *must* be inferred. Upon this point the authorities are strong.

Mr. Brandt, sec. 301, cites cases and gives the rule as follows:

"If the parties act upon an implied agreement to that effect it will be sufficient."

Mahew *v.* Boyd, 5 Md., 102;
Hubbard *v.* Guney, 64 N. Y., 458;
Lea *v.* Dozier, 10 Humph. (Tenn.)

In Lea *v.* Dozier, *supra*, the principal, after a note on which the principal and surety were liable fell due, the principal executed a deed of trust to the creditor, with authority to sell the property conveyed for the satisfaction of the debt after six months. There was no *express* agreement for delay, but the court held that such an agreement was necessarily implied, and the surety was thereby discharged. This case is on all fours with the case at bar.

In the case of Hubbard *v.* Guney, 64 New York, 458, the plaintiff had taken a promissory note with a surety. When it matured the principal debtor made a new note, which the plaintiff indorsed and discounted and the avails were paid to him. When the note matured a payment was made by the principal and a new note given. In an action upon the original note, held that there was an *implied* agreement to extend time of payment, which being done without the knowledge or con-

sent of the defendant, discharged him from liability; that the fact that the note in suit was not surrendered did not affect the character of the implied contract or its legal effect, and that the receipt of the money obtained upon the new note was a sufficient consideration on the part of the plaintiff for such a contract.

In Place *v.* McIlvaine, 37 New York, 96, the facts were the principal debtor sent his check, dated ahead, to the creditor requesting him to hold same, and when paid he would call for the note. The creditor kept the check without communicating with the principal debtor. The check was not paid at maturity. In a suit on the original note the indorsers plead an extension of time given to the maker. Held, the latter by fair construction contained a request for time of payment until the maturity of the check, and that by retaining the check until it matured and presenting it for payment, the plaintiff assented to the request.

See authorities, *supra*—

Bangs *v.* Strong, 7 Hill, 250;
Fellows *v.* Prentiss, 3 Denio, 512;
Myers *v.* Wells, 5 Hill, 463.

In Brooks *et al. v.* Wright, 13 Allen, 72, the Supreme Court of Massachusetts in discussing this question said:

"We know of no rule which requires that an agreement to give time to a principal, by which a surety will be discharged, must be in writing or in any precise form of words, or *even in express language at all.* It is a question of *mutual understanding* and *intention*, and, like other contracts, the agreement of the parties may be derived from and *inferred by acts, declarations, facts, and circumstances.*

Thus it will be seen the authorities are uniform to the effect that the agreement by the creditor to give time to the principal need not be made manifest by any express

terms in order to discharge the surety. It is sufficient in that regard if it appears from all the circumstances that such was the *mutual understanding.*

Point VI.

It is equally well settled (see authorities, *supra*) that the fact that the surety is not injured by such extension of time, or by such change in the obligation of the contract in which he is surety, is no answer to the plea of release. Nor would the fact that he was even benefited by such change avail the creditor anything.

Brandt on Sur. and Guar., sec.; also authorities *supra;*
Greenfield Savings Bank *v.* Stowell, 123 Mass., 196, and cases there cited;
Wood *v.* Steel, 6 Wall., 80;
Angel *v.* N. W. Ins. Co., 92 U. S., 330;
Mersman *v.* Werges, 112 U. S., 141.

In People *v.* Brown, Douglass, Mich., Rep., vol. 2, p. 13, six sureties signed their name to a sheriff's bond, with penalty of $25,000. Subsequently, and without their consent, the *court,* whose business it was under the law to fix the amount of the penalty and affirm the bond, reduced the amount of the penalty by erasing the word five, making the penalty in $20,000 instead of $25,000. This it was held released the sureties. The court, Justice Goodwin delivering the opinion, said:

"It is insisted that the responsibility of the parties is not changed by the reduction of the amount of the penalty; that it is the *condition* which imposes the liability; and that the sureties are not prejudiced. Whether the sureties are prejudiced or not, is wholly immaterial. Any alteration in the terms of their contract, by the parties to it, which changes their situation, without their consent, discharges them when the contract has been actually made. Whether beneficial or

not is for them, and them alone, to determine—not for the other parties. They have a right to stand upon the terms of the contract, and if varied without their consent to say *non in hoc fœdus veni*. Equally so, certainly, when the stipulations of their contract, after receiving their assent, are varied by officers to whose approval it is required to be submitted before it is consummated."

Now, in strange contrast and direct antagonism to these well-settled doctrines as to the effect on the surety of an extension of time, or a change in the terms of the obligation, by an agreement between the creditor and principal debtor, supported by a sufficient consideration, is the rule announced in this case by the learned judge who tried the case in the court below. Judge Deady, after conceding the general doctrine that an extension of time, based on a sufficient consideration, will release the surety, engrafted on the rule an obnoxious and untenable qualification which utterly destroys it and the reasons on which it is based, to the effect that if it is made to appear by the creditor that the surety was in no way injured by such extension, he can not complain, and in such event is not released. The following is from the opinion of the court below (Record 86):

"But this equitable principle is not to be applied so as to produce inequitable results as is often the case with the operation of the rule that arbitrarily releases a surety from his liability where the creditor has given the principal an extension of time, without reference to the fact of whether the surety was or could be in any way injured thereby. *Therefore, when it appears that the surety was in no way prejudiced by the release of the debtor's property, because the property of the surety would be needed to satisfy the debt in any event, he can not complain of such release.*

And again the court, in passing on the case on the rehearing (Record, 95), while conceding that the "*weight of authority is otherwise*," and while arguing that in this

case there was no extension based on any consideration, adhered to the doctrine announced in the first opinion, and which seemed to be the controlling idea of the court throughout all of the proceedings in that court, namely, unless in any event it could be shown that the surety was injured there was no release. He said:

"However long the creditor might delay or forbear the collection of his debt by legal proceedings on this account, or on any other voluntary arrangement or understanding, he was at no time legally bound to forbear such proceeding, and unless he was the surety can not be heard to complain; *and I don't think he ought to then unless he can show that he was injured by the delay.*"

While the authorities seem to be uniform to the effect that in a case where there has been either a change in the terms of the contract, or an extension of time by agreement between the creditor and principal debtor without the consent of the surety, it is wholly immaterial whether the change in the terms or the extension of time has resulted in injury to the surety, the court below in this case proceeded all through the case on the theory that *unless* the surety is injured thereby he is not released. See opinion (Record, 42), where the court, assuming this to be so, proceeds to discuss the question as to where the burden of proof rests on the issue as to whether the surety has been injured or not, and says:

"The rule seems to be that the burden of proof is on the creditor in a case of this kind to show that the surety has not been injured by the transaction." (Record, 42.)

An effort was made by the court below to bring this case in its material aspects away from all question of change in the obligation of the surety and extension of time to the principal debtor, and to bring it within the equitable rule growing out of the relation of principal and surety which requires that the property of the former

pledged to the creditor for the payment of his debt shall be applied to that purpose, so as to prevent the burden of the debt from being thrown on the surety, and Brandt on Sur. and Guar., sec. 370, Hayes *v.* Ward, 4 Johns. Ch., 129, and Baker *v.* Briggs, 8 Met., 129, are quoted in support of the proposition.

This equitable rule is elementary, recognized by courts, and well understood, and comes in to meet all those cases where there has been a failure through negligence or otherwise upon the part of the creditor to fairly, honestly, and in good faith apply the property of the principal debtor to the reduction of the debt; and yet where there has been no such contract or agreement between the creditor and principal debtor as amounts, as in the case at bar, to an actual change in the terms of the obligation of the surety, or, as in the case at bar also, to an extension of time to the principal debtor, all without the consent of the surety. The rule is wholly independent of and distinct from that relating to the release of a surety because of a change in his obligation, or of an extension of time to the principal debtor. The *facts* in the case at bar bring this case clearly within the latter rule in both of its aspects, namely, change of obligation, and extension of time; and the equitable rule referred to by the learned judge who tried this case has, it is respectfully submitted, no application to the case whatever.

It is in cases coming *solely* within the scope of this equitable rule, and wherein there is no element of change in the obligation of the surety or extension of time to the principal debtor, that *some* writers and *some* courts have held to the doctrine, that unless it was made to appear that the surety had been injured by whatever dereliction had occurred he could not be heard to complain; while in all cases where there has been either a change in the contract, or an extension of time, based on a consideration moving to the creditor, and without the con-

sent of the surety, the authorities are uniform to the effect that the surety is released, wholly irrespective of the question as to whether he was or was not injured.

BUT THE SURETY IN THIS CASE *was* INJURED.

But suppose the court below is correct in holding that if it is shown that the surety is not injured by what has occurred, that then she is not released; even then, it is confidently submitted, that under the rule as to the burden of proof announced by the learned judge and the state of the pleadings and evidence in this case, the decree of the court below must be reversed.

The court below declared the rule as to the burden of proof to be as follows:

"The rule seems to be that the burden of proof is on the creditor in a case of this kind to show that the surety has not been injured by the transaction. Brandt on S. and G., 370." (Opinion, Record 84.)

Conceding, therefore, for the moment, and for the argument, that this is a case where the question of the release of the surety depends on the other question as to whether she was or was not injured, then it is submitted that the creditor so far from having shown by any allegation or testimony whatever that the surety was *not* injured by the transaction, has not even attempted to make any such showing, while on the contrary the testimony on the part of appellants admitted by the stipulation of the parties, and which stands uncontradicted, shows most conclusively that the surety *was* injured in the sacrifice of large portions of the lands of the principal debtor.

Referring to the rule of the court below that the burden of proof rests on Allen and Lewis, or on the complainant Lewis, to show that Pluma F. Cross, the surety,

was not injured by the transaction between the creditors and the principal debtor, Thos. Cross, where, let us inquire, in the record of this case is there either *averment* or *evidence* to the effect the surety was *not* injured? There is not one scintilla of evidence on the subject; not a solitary witness was called by complainant, while the only concession made by appellants which, in the slightest degree, could be construed as tending in the least in such direction is the statement that the survey and appraisement mentioned in the bill of complaint were made openly and without fraud, and that the persons who made the same would, if testifying, approve the same. There is, therefore, a total failure upon the part of complainant to show that the surety was not injured by all the postponements, delays, changes in modes of sales, and sales private as well as public that took place.

But not only so. The evidence of appellants and concessions of complainant in stipulation (Record 76) very conclusively show that the surety *was very materially injured.* In that stipulation it is conceded by complainant that five witnesses, all of whom reside and own lands in the vicinity of the lands sold at public auction by said C. H. Lewis, and competent witnesses to give opinions relative to the value of land, would, if called as witnesses, testify that said lands so sold by said Lewis were, at the time of such sales, worth $13,360, whereas they were sold for $8,593.19.

These five competent witnesses, it is admitted by complainant (Record, 76), would have testified, if called, and the object of the stipulation was to save expense, as follows:

1st. The tract of 187.60 acres, more or less, sold to J. I. Thompson for $397.98, which had been appraised at $750.80, was at said time worth $1,000.

2d. The tract of 225.48 acres, more or less, sold also to said J. I. Thompson for $3,435, which had been appraised at $3,466.50, was at said time worth $5,000.

3d. The tract of 160.2 acres, sold to C. C. Keney for $1,680.21, which had been appraised at $1,733.75, was at the said time worth the sum of $3,200.

4th. The tract which was sold to S. R. Scott, containing 80 acres, for $480, which had been appraised at $560, was at the said time worth the sum of $960.

5th. The tract containing 209.36 acres, which was sold to said S. R. Scott for $2,600, and which had been appraised at $1,913, was at the said time worth the sum of $3,200.

The weight of testimony, therefore, in this case, all the circumstances considered, is strongly in favor of the proposition that the surety *was* injured by these transactions.

But aside from this direct testimony it is impossible to measure the saving to the surety had there been no changes or postponements, and had the mortgages been foreclosed as stipulated in their conditions and as provided in the law, and the matter closed up in the lifetime of Mr. Cross, the principal debtor.

Point VII.

Was there an Agreement for Extension of Time?

But the court below while antagonizing these well-settled doctrines, finally falls back on an assumed issue of fact, and while admitting (see opinion, Record, 87) that if the parties act upon an implied agreement for an extension of time, it will be sufficient; and while conceding that an arrangement entered into by which a portion of the lands belonging to Thomas Cross, deceased, was sold without foreclosure and at private sale, and also at public auction on the State fair grounds, might *fairly imply* that the firm of Allen & Lewis would, whilst the said arrangement was being carried out, forbear to sue a debtor, says:

"But there is no evidence of any agreement thereabout, or consideration therefor. An agreement to give the debtor time is not binding unless made for some definite period and on a sufficient consideration. And although the creditors should, in pursuance of the agreement or understanding, express or implied, actually forbear to sue for a given length of time, and without any consideration therefor, the surety is not thereby discharged, and the reason is apparent. Such an arrangement is not binding, therefore it does not prevent the surety from paying the debt and proceeding with the right of a creditor to enforce the claim against the debtor."

In answer to the above argument attention is respectfully called to the facts that the appellees herein have pleaded in their complaint that—

"On the 22d day of January, 1876, the said Thomas Cross and his then wife, C. M. Cross, duly made, executed, acknowledged, and delivered to the defendant, C. H. Lewis, who was then a part owner of said notes and mortgages hereinbefore mentioned, an instrument upon its face purporting to be an absolute deed of warranty to all the property hereinbefore described, and subject only to the mortgage herein first mentioned. That said deed was thereafter, on the 28th day of January, 1876, duly recorded at pages 576, 577, 578, and 579, of book 18, of records for deeds for Marion County, State of Oregon. That although so absolute upon its face, the said deed was intended by the parties thereto, and, in fact, was a deed in trust to said C. H. Lewis for and upon the following trust: That said C. H. Lewis should, at the cost and expense of said lands, keep the same in cultivation or lease or let the same or any part thereof; to sell and dispose of the crops and collect the rents and to apply the same upon said mortgage debts of said Thomas Cross hereinbefore mentioned, and it was also understood and agreed between the parties to said deed that said C. H. Lewis might at any time sell any portion or portions of said lands at private sale with the consent of said Thomas Cross and upon such sales to apply the proceeds towards the liquidation of the amount due on said notes as aforesaid." (Record, 7–8.)

And in the amendments to the said bill of complaint, hereinbefore recited, the appellees have pleaded:

"And complainant further alleges that during the year 1876, and prior to the 14th day of October, 1876, the said defendant C. H. Lewis caused the lands above described as situated in sections three, nine, ten, fifteen, sixteen, twenty-one, twenty-two, twenty-seven, and twenty-eight, in township six south of range three west, Willamette meridian, containing in all 2,326.37 acres, more or less, to be surveyed and divided into parcels numbered from one to fifty-five, inclusive, each parcel containing about forty acres of land, and at the same time caused and procured an appraisement and valuation of such lands so surveyed to be made by the said Thomas Cross, deceased, and by other interested persons familiar with the character and value of said lands, and also caused and procured a plat or map of such survey to be made, and which map or plat was recorded in the office of the county clerk of Marion County aforesaid by said Thomas Cross, deceased, on the 14th day of November, 1876, where the same now remains on record. That on the 14th day of October, A. D. 1876, and subsequent thereto, and prior to November 15, 1876, the defendant, C. H. Lewis, *under and by virtue of such understanding and agreement* with Thomas Cross, deceased, sold and disposed of certain portions of said mortgaged premises, to wit:

"First. To one J. I. Thompson the land known and described upon the survey and plat of said lands as lots numbered 53, 54, and 55, and upon the Government survey as lots 1, 2, and 3, in section 4, in said township 6 south, range 3 west, containing 187.65 acres, for the sum of $397.98, which had been appraised at $750.00." (Record, 49.)

Thereafter follows the description of large portions of said lands so sold under and by virtue "of such *understanding and agreement* with Thomas Cross." Following are other allegations in said amendments to their bill of complaint, and after describing the parcels of land so sold by them, all of which was contrary to the provisions of the mortgage, the appellees plead:

"That of the lands so as aforesaid sold by said C. H. Lewis, lots 38, 39, 40, 42, 43, 46, 47, and 48 thereof, as designated upon said plat and survey, were sold subsequent to said 14th day of October, 1876, *at private sale*, and that the remainder of such lands so as aforesaid sold by C. H. Lewis, were sold at *public auction* at the State fair grounds at Salem, Oregon, on said 14th day of October, A. D. 1876; that such sales were long prior thereto extensively advertised throughout the State of Oregon in the following newspapers, to wit: the *Daily Oregonian* and the *Daily Evening Standard*, printed and published at Portland, Oregon; in the *Willamette Farmer*, the *Salem Statesman and Mercury*, and in the *State Fair Gazette*, printed and published at Salem, Oregon; and by hand-bills and posters distributed throughout the counties of Marion and Polk, State of Oregon." (Record, 49–52.)

Following the said amendments, at page 51 of the record, they plead "that the costs and expenses of such sale, cost of advertising, surveying, appraising, platting, and mapping such lands amounted to the sum of $809.85."

In answer to the argument of the court below that there was no evidence upon the question of the extension of the time nor consideration therefor, we say: That surely no evidence thereof is necessary when the party, in seeking to avoid the effect of his act, has seen proper to plainly allege the fact in his complaint. It could not be proven more explicitly than they have seen proper to allege it, that is to say, they assert that they set a time for disposing of these lands, and extensively advertised the same; the time was fixed during the session of an agricultural fair near the city of Salem, and it was extensively advertised by all means calculated to attract bidders to the time and place of the same; and he also pleads that it was done in *pursuance of the understanding and agreement which was entered into the January preceding the time that the lands were so sold*, by which Thomas Cross, deceased, the father of the appellants herein, made a

deed of all his interests in the entire tracts of land, including the interest which he held as tenant by the courtesy in the lands belonging to his deceased wife, to C. H. Lewis, upon the alleged trust set forth in their said bill of complaint. Can it be said, in the light of these facts, that there was no consideration for this "agreement" and "arrangement" and in the face of the fact that they had accepted a deed and relinquishment as it were of his equity of redemption in his own lands, had come into immediate possession of rents and profits, had secured a release of the right of redemption incident to sale on foreclosure, and obtained a conveyance of his life estate in the lands of his deceased wife?

See Miller *v.* Stewart, 9 Wheat., 234;
Loomer *v.* Wheelwright, 3 Sandford's Chancery, 171 and 172;
Dobbin *v.* Bradley, 17 Wendell, 422;
Brickhard *v.* Brown, 5 Hill, 640;
Mayhew *v.* Boyd, 5 Maryland, 102;
Place *v.* McIlvaine, 37 N. Y., 96;
And authorities *supra.*

There is a remarkable contrast between this argument, which is in keeping with all well-considered cases upon the subject, and that of the learned judge who announced the opinion of this case in the court below. He says (Record 88):

"Second. The property could not be lawfully sold otherwise than on the decree of a court given in a suit to enforce the lien of the mortgage as provided therein. This provision in the mortgage giving the creditors a right in case of default in payment to enforce the lien of the mortgage by legal proceedings is a mere superfluity. The law gave them that right, and, notwithstanding the provision, the creditors and the debtor were at liberty to make any disposition of the property they saw fit for the purpose of paying the debt or any por-

tion of it, and the surety has no right to complain of it *unless she can show she was injured by it*, which she was not, but rather the contrary, for it goes without saying that the property sold under this arrangement brought more than it would at an ordinary sheriff's sale."

It is certainly a remarkable assumption on the part of the learned judge when he announces in the opinion of the court, as a conclusion of law, that the property sold for *more*, under this arrangement, than it would at an ordinary sheriff's sale. Where this information was acquired, and where the precedent for the judicial conclusion is, to say the least, are questions involved in some obscurity.

Point VIII.

WHAT WAS THE CONTRACT ENTERED INTO BY PLUMA F. CROSS, THE SURETY, AND HOW WAS THAT CONTRACT CHANGED?

What was the *exact* nature of the obligation entered into by Pluma F. Cross as her husband's surety? This must be clearly understood. It was simply this: That in the event of a failure on the part of her husband to pay the two notes, principal and interest, according to their form and tenor when due (see bill of complaint, Record, 5); and in the further event that in case of such failure, there should be a foreclosure of such mortgages according to law, and a sale first had of all such mortgaged property *other* than that owned by Pluma F.; and if on such foreclosure and sales sufficient funds should not be realized "to pay the full amount due on said notes, and the costs, disbursements, and expenses of foreclosure and sale" (see complaint, Record 5), that *then*, the *two* tracts owned by Pluma F., and *not* until then, should be sold, and sold separately for the purpose of realizing any deficiency. (Complaint, Record, 5).

The terms of the obligation of the surety are clearly stated in the bill of complaint (Record, 5) as follows:

"That the condition of such mortgage was such that if the said Thomas Cross should well and truly pay the promissory note hereinbefore mentioned, principal and interest, according to its form and tenor, then the said mortgage should be void; but if default should be made in the payment of the principal or interest on said note, then the said mortgagees, their heirs or assigns, were authorized and empowered to foreclose said mortgage and sell the property therein described, and from the proceeds thereof to pay the amount due on said note and all costs and expenses of sale."

And further (see complaint, Record, 5):

"That it was in and by said mortgage further *expressly provided* that in the event of a foreclosure of said mortgage and sale of said mortgaged property, that the tracts therein in said mortgage and herein numbered as 'fourteenth' and 'fifteenth' should be sold separately, and that said tracts should not at all be sold if sufficient should be realized from the sale of the other property therein described to pay the full amount due on said note and the costs, disbursements, and expenses of foreclosure and sale."

The condition in the $10,000 mortgage was substantially the same as to foreclosure. (See complaint, Record, 7.)

There is nothing in this contract, it is respectfully submitted, from beginning to end from which it could be inferred that Pluma F. would have consented, had they been proposed at the time of entering into this contract as surety, to the further conditions, stipulations, and terms subsequently incorporated after her death; that is to say, that for two years after said notes became due there should be a failure to foreclose or take any steps looking toward collection of the debt from the principal debtor, and that then, *instead* of foreclosure in the usual way, the whole

of the property, including her husband's interest in her two lots, should be transferred by deed of conveyance absolute on its face to the mortgagee or his agent; that possession should be given with full authority by oral arrangement *only* that such deed, absolute on its face, should be regarded as a deed of trust only; such arrangement authorizing and requiring C. H. Lewis "*at the cost and expense of said lands* to keep the same in cultivation or lease or let the same or any part thereof at his option; to sell and dispose of the crops at private sale and collect the rents and apply the same upon said mortgage debts;" and further, that he, "said Lewis, might at any time sell any portion or portions of said lands at *private sale* with the consent of said Thomas Cross, and upon such sales to apply the proceeds towards the liquidation of the amount due." (See complaint, Record, 8.) And further still, that after all this, said trustee, Lewis, should have the right to cause surveys to be made and divide and subdivide the said lands into 40-acre tracts and cause appraisements thereof to be made by appraisers in the selection of whom Pluma F., as a surety, was to have no choice, and fix a date in the future for selling the same at public auction at the fair grounds on October 14, 1876; and that in the meantime no proceedings should be had at law to collect said notes or in equity to foreclose said mortgages. It would seem preposterous to claim that the terms and conditions of the obligation originally entered into by Pluma F. as a surety of her husband have not been *materially* and *radically* changed by these new agreements entered into between her husband and his creditors after her death; and not only so, but by these very same transactions *time of payment was extended to Thomas Cross, the principal debtor, to a day certain and upon the most substantial considerations.*

Point IX.

THE PROVISION OF THE OREGON STATUTES RELATING TO FORECLOSURE ENTERED INTO AND BECAME A PART OF THE SURETY'S CONTRACT.

Section 323 of the Oregon Civil Code (1842–1872), in force when these mortgages were made, provides as follows:

"A mortgage of real property shall not be deemed a conveyance so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure and sale according to law."

While by section 414, page 423 (Hill's Code), being the act of date October 11, 1862, it is provided:

"Section 414. A lien upon real or personal property other than that of a judgment or decree, whether created by mortgage or otherwise, shall be foreclosed and the property adjudged to be sold to satisfy the debt secured thereby by a suit. In such suit in addition to the decree of foreclosure and sale, if it appear that a promissory note or other personal obligation for the payment of the debt has been given by the mortgagor or other lien debtor, or by any other person as principal or otherwise, the court shall also decree a recovery of the amount of such debt against such person or persons as the case may be, as in the case of an ordinary decree for the recovery of money."

It has frequently been held by the Supreme Court of the State of Oregon, and also by the Circuit Court of the United States for the District of Oregon, and the rule has been sanctioned in repeated cases by this court, notably, in the case of Teal *v.* Walker, 111 U. S., 738, that the mortgagee of mortgaged premises has no right to the possession of such premises until he obtains the same in the regular course by virtue of foreclosure proceedings under the statutes of that State. This court, going to the

extent, in the case of Teal *v.* Walker, *supra*, opinion by Mr. Justice Woods, of holding that a stipulation in the mortgage to the effect that on failure upon the part of the debtor to pay the debt when due the mortgagee should be entitled to take possession of the mortgaged premises without proceedings in foreclosure, *was absolutely void as being an agreement against the public policy of the State.*

"Under a mortgage including rents, issues, and profits, until the mortgagee takes possession they belong to the mortgagor, and are subject to claims of the mortgagor's creditors."

American Bridge Co. *v.* Heidelbach, 94 U. S., 798;
Galveston, etc. R. R. Co. *v.* Cowdrey, 11 Wall., 459;
Gilman *v.* Ill., Miss. Tel. Co., 91 U. S., 603;
Teal *v.* Walker, 111 U. S., 242.

In the case of Teal *v.* Walker, 111 U. S., *supra*, this court held that the statutes of the State of Oregon, being the same in force in that State ever since prior to the date of the execution of the mortgages by Pluma F. Cross, "establishes absolutely the rule that the mortgagee is not entitled to the rents and profits until he gets possession under a decree of foreclosure."

It is respectfully submitted, therefore, that these sections of the Oregon statutes entered into and became a part and parcel—an essential ingredient—in the contract of suretyship entered into by Pluma F. Cross with her husband at the time she placed her name to the mortgages in question; that is to say, she had a right to expect, when signing those mortgages and becoming security for her husband, that in the event of a failure to pay the notes *when due* the remedy provided in these statutes would be followed, and none other. While ordinarily,

and even in this case, it may be conceded that the principal debtor, Thomas Cross, had the right to convey the equity of redemption and deliver the mortgaged premises to the possession of the creditors, or to one of them for the benefit of all, yet it is confidently submitted that he had no right to do this without the consent of his surety, and if he did do it without such consent the effect is the release of that surety *ipso facto*.

Point X.

What, in brief, were the considerations moving to the creditors, Allen and Lewis, in the agreement by which time was extended from January 22, 1876, to October 14, 1876?

First. They obtained, by virtue of this agreement, immediate possession of all the mortgaged lands. This, but for the agreement of Thomas Cross, they were not entitled to, either under the terms of the mortgages or the statutes of the State, until after foreclosure and sale.

Second. By this agreement they became entitled immediately to the rents and profits—the crops—which but for the agreement they were not entitled to, and could not have obtained, until after sale or foreclosure.

Third. They were saved the costs and expenses of a suit to foreclose.

Fourth. By agreement the creditors became *at once* the owners in fee of the equity of redemption.

Fifth. By agreement they became the owners of the interest of Thomas Cross in the mortgaged lands of his deceased wife—something they did not *possess*, and on which they had no claim under the mortgages.

Sixth. By the agreement all right of redemption on the part of Thomas Cross was cut off; a very valuable right attaching to him under the Oregon statutes. This was surrendered to the creditors when the deed and agreements of January 22, 1876, were consummated.

Point XI.

The Right of Redemption.

Under the statutes of Oregon the same right of redemption of mortgaged property sold on foreclosure exists as in the case of the ordinary sale of property on execution. (Oregon Code, secs. 417–418.)

Again, the statutory right of redemption after a sale under a decree of foreclosure is a rule of property in the State of Oregon and must be recognized and accorded in the Federal Courts equally with those of the State.

Brine *v.* Hartford Insurance Co., 96 U. S., 627;
Swift *v.* Smith, 102 U. S., 442;
Conn. Mutual Life Ins. Co. *v.* Cushman, 108 U. S., 51; 105 U. S., 247.

The right to redeem is a favorite equity and will not be taken away except upon a strict compliance with the steps necessary to foreclose it.

Shillaber *v.* Robinson, 97 U. S., 68;
Russell *v.* Southard, 12 Howard, 129;
Chicago D. V. R. R. Co. *v.* Fosdick, 106 U. S., 47.

This court has gone to the extent of holding that the right of a borrower to redeem can not be waived by a stipulation of the parties made at the time of the contract, even if embodied in the mortgage.

Pugh *v.* Davis, 96 U. S., 332.

Leaving out of the case all question of surety, it is well

settled that the courts, both Federal and State, will guard with jealous care the right of redemption existing in favor of parties mortgaging their real estate.

Hence it has been held that a decree of the Circuit Court of the United States in a suit to foreclose a mortgage of lands in a State, must give effect to the equity of redemption after sale provided by the statutes of that State.

Orris *v.* Powell, 98 U. S., 25 and 238;
Brine *v.* Hartford Insurance Co., 96 U. S., 627;
Connecticut Mutual Life Insurance Co. *v.* Cushman, 108 U. S., 51.

The several sales made of different parcels of the principal creditor's mortgaged lands as averred in the bill of complaint (Record, 49 and 50) by the creditor and trustee, C. H. Lewis, had the effect of passing an absolute title to the several purchasers and per consequence cut off that right of redemption either on the part of Thomas Cross or their legal representatives, including Pluma F. Cross, had she survived him. (Jackson *v.* Lawrence, 117 U. S., 679.) This was something the principal creditor, her husband, had no right to do without her consent. And in any event, it is clearly manifest if he did so, it constituted in and of itself a *sufficient consideration* to support the agreement for extension of time by the creditors.

In view of the foregoing, it is respectfully submitted, with all deference to the learned judge who tried this case in the court below, that it will not do to say, as was said in the opinion filed in the case (Record, 87), "*but there is no evidence of any agreement thereabout, or consideration therefor.*"

Point XII.

But in addition to all this, even if no consideration had passed, it is enough that there was an implied under-

standing or agreement there should be an extension, and this understanding was *acted upon* by the parties. Mr. Brandt says: "If the parties *act upon an implied agreement for extension of time*, that will be sufficient." Mr. Brandt, at section 301 of his work on suretyship, further says that an agreement will discharge a surety, although the same can not be specifically enforced as between parties. He argues:

"An agreement, upon a valid consideration by a creditor, not to sue the principal for a stated time, discharges the surety even though this agreement can not be specifically enforced. With reference to this it has been said, it must be admitted that a valid agreement not to sue for a debt for a limited time can not be pleaded in bar of an action brought for the debt within that time. But still the law is well settled that such an agreement by a creditor with his principal debtor discharges the surety.

"The doctrine which is derived from chancery is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it. If the holder of a note payable on demand makes a valid agreement with the principal to receive payments by yearly installments, he thereby discharges the surety. *In such case it was argued that the note might be sued notwithstanding the agreement*, and the only remedy of the principal would be a suit for damages for breach of the agreement. But the court said that argument ought not to prevail, for it would be founded upon a presumption of the creditor's own wrong. It is not to be presumed that the agreement will be violated on the part of the creditors."

Brandt on Suretyship, section 301–304;
Union Bank *v.* McClung, 9 Hum. Tenn., 98;
Ducker *v.* Rapp, 67 N. Y., 464;
Brooks *v.* Wright, 13 Allen, 72;
Place *v.* McIlvaine, 37 N. Y., 96;
Hubbard *v.* Guney, 64 N. Y., 458;
Bangs *v.* Strang, 7 Hill, 250;
Fellows *v.* Prentiss, 3 Denio, 512;
Myers *v.* Wells, 5 Hill, 463.

The authorities, therefore, are to the effect, and they are based on reason and common sense, that although an agreement giving the principal debtor an extension of time may be without any valid consideration, one that might have been treated as a *nudum pactum* by either surety or creditor, yet if *finally acted upon by principal debtor and creditor and executed* without the consent of the surety and, as in this case, without her knowledge—as she was dead—it is just as effective to release the surety as though there had been a valid construction.

MERGER—POINT XIII.

We insist further, the acceptance of the deed of January 22, 1876, by Lewis as one of, and on behalf of, the creditors operated as a merger of the mortgages.

Loomer *v.* Wheelwright, 3 Sandford's Ch., 171–2.

It is impossible, it is respectfully contended, under the circumstances of this case for the creditors to take the deed pleaded in the bill and at the same time prevent a merger as to the lands of the security. The purpose of the deed was to allow Mr. Lewis "to sell the land at public or private sale." Now, where was the legal title? Certainly not in Cross, but most certainly in Lewis, otherwise the lands sold by him are still encumbered by the mortgage. It is a mistake to suppose that they could merge the title as to the lands sold and prevent a merger as to the other lands if any should remain. The act of making that deed had its legal effect upon all the land embraced in it or upon none. The fact that deeds were made by Lewis is conclusive of the point and fixes upon him the fact that he believes he had the legal title. If he *did* hold the legal title under the conveyance of January 22, 1876, as we concede he did, he being *also* the owner or part owner of the mortgages, he cancelled or merged them by accepting the superior title. He can

not hold the law in the hollow of his hand. The question of the legal effect of the acceptance of that deed is not to be determined by the whim or caprice of the creditor, nor can it be made to take effect or operate by piecemeal. A creditor can not elect to "scrape the bark in opposite directions for different effects."

The Assistant Vice-Chancellor, speaking for the court in the case of Loomer *v.* Wheelwright, *supra*, decides this very point in a well-considered case, and in which the facts are identical on the main points with the case at bar. He said:

"I have no doubt but this is precisely such a case, and that Mr. Wheelwright, although he intended to merge and put an end to the mortgage on Pearl and Cedar streets, equally intended to enforce the mortgage debt upon the lands embraced in the other mortgage, and supposed that the law would bear him out in that proceeding."

Yet the court squarely held that the law would permit no such transaction. It must take effect and be a merger fully and completely or not at all.

Point XIV.

But not only so, Allen and Lewis, by purchasing the equity of redemption from Thomas Cross, the principal debtor, thereby precluded themselves from enforcing the mortgage against the primary fund. And this is so, whether there was or was not a merger of the mortgage given by the principal debtor.

Loomer *v.* Wheelwright, 3 Sandford's Ch., 158.

JURISDICTION.

It is Manifest the Assignment of the Notes and Mortgages by Allen and Lewis, to Allen, a Citizen of California, was Collusive and for the Purpose of Creating a Case Cognizable in the Federal Court.

ASSIGNMENTS 5, 6, AND 7.

These three assignments relate to the question of the jurisdiction of the court both as to parties and subject-matter, and will be considered together and first as to error assigned in number 5, namely:

The court erred in holding that the transfer of the interest of C. H. Lewis to his partner, the respondent, was *bona fide*, and not merely colorable and collusive, and for the purpose of conferring jurisdiction on the Federal Court.

POINT I.

This involves the finding of a question of fact, and, it is confidently submitted, all the circumstances surrounding and connected with the case, including the testimony of Mr. Lewis himself, clearly show that the transfer of the notes and mortgages was collusive and for the purpose solely of creating a case of foreclosure cognizable in the United States Court under section 1 of the act of March 3, 1875; and such transfer was in direct contravention of section 5 of said act.

POINT II.

First. This transfer was not made by the owners and holders of these notes and mortgages to a *third* party, but by a *firm* to an individual member of the *same* firm, the firm being and doing business in the same State, and Mr. Lewis, one member, and the active member also, as

appears from the history of this case, being also a citizen of the same State—Oregon—as were the makers of the notes and mortgages; while Mr. Allen, the alleged purchaser, was a citizen of the State of California. Nor does it appear that such alleged transfer and sale followed any dissolution of the firm; while moreover, the case shows that Mr. Lewis had transacted all business connected with the long, complicated matter, running through a period of eleven or twelve years; while there is nothing to show any personal knowledge whatever of the condition of the claims, their probable value, the prospect of collection of the whole, or any part thereof, on the part of the purchaser, Mr. Allen. *These circumstances* in and of themselves, it is respectfully submitted, involve the transfers in suspicion, to say the least, at the very start.

But the case is not left to stand on suspicious circumstances, although they are many and strong. Mr. Lewis testifies that when the transfer was made they had in view the prosecution of the cause in the Federal Court, and that no money ever passed hands in the convenient method which Mr. Lewis adopted in dealing with himself; he simply charged Mr. Allen with $40,000 on the books when the assignment was made. Was he imposing on the good nature of his senior partner? Not by any means. Anyone familiar with the business character of Mr. Lewis knows he would suffer any amount of pecuniary loss rather than entail it upon anyone, much less upon the man who had confided in him, and trusted not only to his judgment, but his honor, and was willing to trust him to the utmost extent.

Did Mr. Allen want to invest $40,000 in an old firm debt of twelve years' standing since due—a property about which he had no personal knowledge, the debtor and his surety both dead, their estates in the probate court, and their property in the hands of a trustee as well as in charge of the decedents' court? Was "*proba-*

bility" even "*kept in view*" in this transaction? Certainly not. But did Mr. Lewis slip away from the whole unpleasant business when the firm *sold* and *transferred* the *claims* to Mr. Allen? Not at all. Look at the sequel to the transaction, when subsequently the mortgaged lands belonging to Mr. Cross were sold by the receiver under direction of the court, Mr. Lewis buys it all but the city property, and takes deeds by order and direction of the court below from the receiver.

Mr. Lewis, while in all probability not aware at the date of the transfer that there was anything at all objectionable, either in law or morals, in making a colorable transfer for the purpose of having his interests and those of the firm adjudicated in the Federal Court, did not when called to the witness stand hesitate a moment in declaring the real nature of the transaction; and in response to counsel's question as to whether it was not a fact that one of the purposes of the transfer of the notes and mortgages to Mr. Allen, he being a citizen of California, was to make a case that could be tried in the United States Court, answered promptly "*well, we had that object in view at the time the transfer was made.*"

Mr. Lewis' testimony on this branch of the case is found at page 108 of the Record:

Q. Did you render Mr. Allen with a statement of the account charging him with the amount of this indebtedness? (Referring to the purchase price of the notes and mortgages.)

A. I did.

Q. How much did you receive for your interest?

A. I didn't receive anything. I charged it to him against his interest in the business.

Q. How much did you charge him with, and when?

A. I can not tell you the exact date, but it was before this suit was commenced. The amount was forty thousand dollars.

Q. When the land or portions thereof were sold by the

receiver you became the purchaser individually, did you not?

A. Yes; some of them.

Q. Did you make this transfer to your partner, General Allen, in pursuance of a contract you had with him, or did he leave the matter to your guidance or discretion?

A. He fully understood the matter, and it was done with an understanding with him.

Q. What was the purpose and object of making the transfer?

A. The principal object was to get the matter settled between us.

Q. Who employed the firm of Fechheimer & Ach to foreclose the mortgage?

A. I employed Mr. Fechheimer in the case with the full consent and understanding of Mr. Allen.

Q. Did you so employ him before or after you transferred your interests to Mr. Allen?

A. He was employed before and after the transfer and had charge of the case at least ten years, and that too with an understanding with Mr. Cross.

Q. Is it not a fact that one of the purposes of the transfer of the notes and mortgages in suit to General Allen, he being a citizen of California, was to make a case that could be tried in the United States Court?

A. Well, we had that object in view at the time the transfer was made.

We confidently insist this record discloses that an imposition was being practiced upon the Federal Court by these parties in making this pretended transfer of the notes and mortgages. This honorable court has never been slow to discountenance transactions of this nature when it is made apparent that the transfer was made for purposes of that kind. In the case at bar, as the record discloses, the appellees or their predecessors in interest, presented the claim to the administrators of Thomas Cross, deceased, in behalf of Allen & Lewis. It still belonged to the firm, and the transfer wasn't made until after it had been so presented and by the administrators rejected.

It is respectfully submitted in view of the foregoing facts, this court should *sua sponta* reverse the decree of the court below for want of jurisdiction and direct said court to dismiss the bill.

Act March 3, 1875, secs. 1 and 5, Rev. Stat., 1874–1881, page 174;
Barney *v.* Baltimore, 6 Wall., 287;
Williams *v.* The Township of Ottawa, 104 U.S., 209;
Hayden *v.* Manning, 106 U. S., 589.

Point III.

But it may be claimed, and in fact is, by the court below in response to the argument that the *assignment was collusive*, that the defendants in this case in their answer have admitted that after the presentation of these claims to the administrators of the estate of Thomas Cross and their rejection by them, Allen & Lewis, for a valuable consideration to them paid by the plaintiff, duly indorsed and delivered to the plaintiff the notes in question, and at the same time assigned to him the mortgages. This, though true, it is confidently submitted, avails nothing. It is quite immaterial what the defendants may have said in their answer on that subject—whether said advisedly or unadvisedly. No amount of concessions or admissions in an answer or otherwise can confer jurisdiction. If it subsequently appears, either from the admissions of the plaintiff or from the evidence in the case, that the transfer was collusive, then no amount of admissions upon the part of any party to the suit heretofore made, or even persisted in now, would dispense with the duty upon the part of this court, if satisfied of the collusive character of the transfer, to reverse the decree of the court below at once and direct a dismissal of the case for want of jurisdiction.

It is too well settled by this court to require argument

that this question of jurisdiction may be enforced by the court, though not raised by the pleadings nor suggested by counsel. In Oelrichs *v.* Spain, 15 Wall., 211, this court said:

"In the jurisprudence of the United States the objection that there is an adequate remedy at law raises a jurisdictional question and may be enforced by the court *sua sponta*, though not raised by the pleadings nor suggested by counsel."

It is submitted that the clause in the judiciary act which ousts a United States Court of Equity jurisdiction in a case where it appears there is plain, adequate, and complete remedy at law, no more raises a jurisdictional question than does the clause in that same judiciary act which deprives a United States Circuit Court of jurisdiction in all cases where either plaintiff or defendant has been collusively made or joined, as in this case, for the purpose of creating a case cognizable in a Federal Court. And if in the former case the jurisdiction should without suggestion of counsel be by the court on its own motion transferred from the equity to the law side of the court, a *fortiori* may it be contended that in the latter the parties should be peremptorily remanded to the State tribunal. Otherwise, if through either the ignorance, negligence, or collusion of counsel the question is not raised, or even attempted to be obscured from the court, the court would be compelled to proceed with the hearing of a case not within its jurisdiction and imposed upon it by the most barefaced collusion and transparent fraud.

This court in the case of Williams *v.* the Township of Nottawa, 104 U. S., 109, opinion by Mr. Chief-Justice Waite, said:

"Under the act of 1789 it was held in Smith *v.* Kernochen, 7 How., 216, that the objection to the jurisdiction

of the court on the ground of citizenship was one which could only be taken by a plea in abatement; but in Barney *v.* Baltimore, 6 Wall., 280, there was no such plea and the bill was dismissed by this court without prejudice, because it appeared in evidence that certain conveyances by means of which the citizenship of the parties was changed so as to give the United States courts jurisdiction, had transferred the real interest of the grantors."

This court, then, in passing upon the 5th section of the act of 1875, said:

"But whatever may have been the practice in this particular under the act of 1789, there can be no doubt what it should be under the act of 1875. In extending a long way the jurisdiction of the courts of the United States, Congress was specially careful *to guard against the consequences of collusive transfers to make parties, and made it the duty of the court, on its own motion,* without waiting for the parties, to stop all further proceedings and dismiss the suit the moment anything of the kind appeared. This was for the protection of the court, as well as parties, against frauds upon its jurisdiction; for, as was very properly said by Mr. Justice Miller, speaking for the court, in Barney *v.* Baltimore, *supra, such transfers for such purposes are frauds upon the court and nothing more.*"

The court furthermore, in considering the opinion in the case of Williams *v.* Township of Nottawa, *supra*, said:

"Inasmuch, therefore, as it was the duty of the circuit court on its own motion, as soon as the evidence was in and the collusive character of the case shown, to have stopped all further proceedings and dismiss the suit; the judgment is reversed and the cause remanded with instructions to dismiss the suit at the costs of the plaintiff-in-error, because it did not really and specifically involve a dispute or controversy within the jurisdiction of that court."

The court below was clearly in error (see opinion, Record, 89) in holding that the defense as to the alleged

collusive nature of the transfer of the notes and mortgages should have been made by a plea in abatement prior to answering the merits:

"The defense must have been made by a plea in abatement prior to answer to the merits, alleging the collusive character of the transfer, and praying judgment that the suit abate in consequence thereof."

The law, therefore, is settled beyond all controversy that the rule under the act of 1875 requires no plea in abatement, but the prompt action of the court on its own motion without waiting for the parties to raise the question dismissing the case whenever it appears from the pleadings or evidence to the satisfaction of the court "that the suit does not really and specifically involve a dispute or controversy properly within the jurisdiction of the circuit court, or that the parties to such suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable under the act of 1875."

Williams *v.* Nottawa, 104 U. S., 209;
Hawes *v.* Oakland, *Id.*, 450;
Detroit *v.* Dean, 106 U. S., 537;
Hayden *v.* Manning, 106 U. S., 589;
Turner *v.* Farmers' L. and T. Co., 106 U. S., 555;
M. C. R. Co. *v.* Swan, 111 U. S., 386;
Farmington *v.* Pillsbury, 114 U. S, 144;
Roe *v.* Grand Trunk Rwy. Co., 23 Fed. Rep., 402;
Ryan *v.* Young, 9 Biss., 63.

In Farmington *v.* Pillsbury, 114 U. S., 114, *supra*, the late Chief-Justice Waite, in delivering the opinion of this court, said:

"This" (that is, the first section of the act of March 3d, 1875, allowing suits to be brought in the Federal courts by the assignees of promissory notes negotiable, etc., etc.,) "opened wide the door for frauds upon the jurisdiction

of the court by collusive transfers, so as to make colorable parties and create cases cognizable by courts of the United States.

"To protect the courts as well as parties against such frauds upon their jurisdiction, it was made the duty of the court at any time when it satisfactorily appeared that a suit did not 'really and substantially involve a dispute or controversy' properly within its jurisdiction, or that the parties 'had been improperly or collusively made or joined for the purpose of creating a case cognizable' under that act, 'to proceed no further therein,' but to dismiss the suit or remove it to the State court from which it had been removed.

"This, as was said in Williams *v.* Nottawa, 109 U. S., 209, 'imposed the duty on the court, on its own motion, without waiting for the parties, to stop all further proceedings. The old rule requiring all objections to the citizenship of the parties to be taken by plea in abatement before pleading to the merits was changed, and the courts were given full authority to protect themselves against the false pretences of apparent parties. This is a salutary provision which ought not to be neglected.'"

The court, Mr. Justice Brown, in Roe *v.* Grand Trunk Railway (23 Fed. Rep., 401), in the Circuit Court of the United States for the eastern district of Michigan, in discussing this question, said:

"While it has been the practice in this district ever since the act of 1875 to plead the want of proper citizenship in abatement, it is clear from the opinion of the Supreme Court in Williams *v.* Nottaway (104 U. S., 209) that this is no longer necessary, and that it is the duty of the court, on its own motion, to dismiss the suit the moment the want of jurisdiction is made evident."

It is respectfully submitted, the ruling of this court in Hartog *v.* Memory (116 U. S., 590), in view of the peculiar state of facts before the court in that case and of the foregoing authorities, should not be regarded as applicable to the facts of this case, or as repugnant to the view now insisted upon.

In that case the defendant, Memory, was sued in the Circuit Court of the United States for the northern district of Illinois, the plaintiff, Hartog, averring that he (Hartog) was a citizen of the kingdom of Holland, and that the defendant, Memory, was a citizen of the State of Illinois. The defendant who, of all others, should have known whether he was a citizen of Illinois or a subject of Great Britian, made answer setting up three several defenses: first, the general issue; second, the statute of limitations of Illinois; and third, the limitation laws of Holland where the cause of action accrued. He not only failed to plead that he was not a citizen of Illinois, and was a citizen of Great Britian, but evidently *actually suppressed all knowledge of the fact* with a view of taking advantage of it in the event of a verdict against him. The course pursued by him was reprehensible in the highest degree, as was made manifest by his subsequent effort to have the verdict set aside and the case dismissed. The testimony in the case which was brought out not by him, but inadvertently, showed him to be a citizen of Great Britian, and even then he did not, either in person or by counsel, raise the question of jurisdiction. There was a jury trial and a verdict rendered against the defendant for $2,497. Then for the first time he suggests that he is not a citizen of Illinois, but a subject of Great Britian, and moves for a new trial on the *sole* ground that he was not a citizen of Illinois, but a subject of Great Britian, at the commencement of the suit. The court granted a new trial and dismissed the case. This court, evidently largely influenced by the reprehensible conduct of the defendant, reversed the decision.

Mr. Chief Justice Waite, in delivering the opinion in the case, said:

"Here the citizenship of both the plaintiff and the defendant, as it was in good faith understood by the plaintiff to be, was stated in the declaration, and it was such

as if truly stated gave the court jurisdiction. The defendant pleaded to the merits. *He alone knew of the mistake as to his citizenship and purposely omitted to make it known at the time.* * * * The testimony about his citizenship was irrelevant and wholly immaterial. It did not in any manner relate to the merits of the case. It apparently came out incidentally without attracting the attention of the court at the time. *The defendant suffered it to pass without special notice until after the verdict against him.* He then moved for a new trial not, so far as the record discloses, because of any errors at the trial, but, as we must presume, for the purpose of laying the foundation for his motion to dismiss; and the case appears to have been dismissed by the court solely upon the defendant's motion and the irrelevant testimony given at the trial, and *without affording the plaintiff an opportunity* to rebut or control *that* testimony. *Under these circumstances*, as there is nothing else in the case to justify the dismissal of the suit, we are of opinion that the order dismissing the suit is erroneous and must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion."

The case under consideration is essentially different as to the facts. It is more than probable that the appellants, at the date of filing answer, had no knowledge or information to justify their making an issue in such answer as to the *bona fides* of the transfer. As a matter of fact, however, they did before trial in the court below make this issue, brought the question to the attention of the court and the complainant, and took the testimony of Mr. Lewis, one of the firm, to sustain it. The complainant had full opportunity, which the plaintiff did not have in the case of Hartog *v.* Memory, to offer counter testimony, and actually did offer counter testimony by way of cross-examination of Mr. Lewis to sustain the *bona fides* of the transfer.

Inasmuch, therefore, as the party complainant has not been taken by surprise, as he had full opportunity to be

heard, and *was* heard on the question before the court below, and as the question of want of jurisdiction is now brought in this manner to the attention of this court, it is respectfully submitted that the rule suggested in the case of Hartog *v.* Memory should not apply here, and if the evidence and all the circumstances connected with this case tend inevitably to the conclusion that the transfer of these notes and mortgages by Allen and Lewis to Mr. Allen was collusive, and for the purpose of creating a case cognizable in the Circuit Court of the United States, that then it is the duty of this court to so declare, reverse the decision of the court below, and direct the dismissal of this suit. This much this court may do in any event and still comform fully, it is believed, to the doctrine enunciated in Hartog *v.* Memory.

In M. C. and L. M. Railway Co. *v.* Swan, 111 U. S., 379, this court, opinion by the late Justice Matthews, said:

"It is an inflexible rule that the judicial power of the United States must not be exerted in a case to which it does not extend, *even if both parties desire to have it exerted.*"

Were the Notes Transferred "Negotiable by the Law Merchant" within the Meaning of Section 1 of the Act of March 3, 1875?

POINT X.

Assignment No. 6.

The court erred in holding the notes mentioned in the complaint to be negotiable according to the law merchant within the meaning of the act of Congress of March 3, 1875.

The above assignment was made when the appeal in this case was taken over four years ago, and doubtless before counsel then concerned in the case had any knowlege of the decision of this court in the case of Ackley School District *v.* Hall (113 U. S., 135), wherein the point seems to have been held contrary to the contention made in this assignment, and the doctrine approved without argument later on by this court in 117 U. S., 336, and perhaps in other cases since then.

Notwithstanding the foregoing, counsel may be pardoned, we trust, inasmuch as the assignment is here, for submitting the following brief suggestions in support of the assignment for the consideration of the court in the event there should be any doubt as to the correctness of the previous ruling on the question.

The act reads:

"Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

By a negotiable promissory note is usually understood one payable to the order of a person named therein as to the bearer, but the act of Congress, *supra*, contemplates, it is submitted, something more. By the law merchant is meant the custom of business men, the custom of merchants in their business conduct with each other and with the business world. It is interwoven with the jurisprudence of the country; it is a part of the law of the land. Congress has limited the jurisdiction to cases of "promissory notes negotiable *by the law merchant*." Are we to understand by this that no promissory note can be negotiable save and except it is made so *by the law mer-*

chant? Or are we not rather to understand that there are *two kinds* of negotiable promissory notes—one negotiable irrespective of what the custom of merchants or the *law merchant* is or may be, and the other kind negotiable *only* according to the custom of merchants or *by the law merchant?* It is respectfully insisted the latter is the proper construction, and that the difference is this: While all promissory notes payable to a person named, or order, or to bearer are negotiable, both before and after they become due and until paid; that a promissory note that is negotiable according to the custom of merchants, or *by the law merchant,* is one negotiated or indorsed and transferred *before it is due.* The custom of merchants as here applied clearly refers to such instruments which, on being negotiated in the ordinary course of business, would in the hands of the holder admit of no defense. It has reference to paper that has not been subjected to dishonor by a failure of payment when due and not to dishonored overdue paper.

When so overdue, so dishonored, and subject, into whomsoever's hands it may then go, to any offsets or defense that might be made against it in the hands of the original payee, it is no longer a promissory note negotiable according to the custom of merchants or *by the law merchant* within the meaning of the act above cited. In short, it is respectfully submitted, we are to understand by the phrase a "*promissory note negotiable by the law merchant*" such an instrument as passes to the indorsee such a title as absolutely cuts off all defenses which the maker might have set up against the original payee.

Is it customary among merchants or any other class of business or commercial men to take promissory notes in the course of their dealings with each other which are years overdue, and but for payments indorsed on their backs would have twice overrun the period of the statute of limitations—notes overdue and dishonored for over

ten years? No such custom ever did prevail in this or any other country; and the Congress, it is submitted, never contemplated including such cases when passing the act of March 3, 1875, but only intended to confer jurisdiction on the Federal courts in the cases of the transfer of such promissory notes, as against which all defenses were closed in the hands of the indorsee.

Any other construction would render the act practically susceptible of the construction that all cases founded on contract or agreement to pay money might be prosecuted by an assignee in a Federal court.

This contention in no wise conflicts with the rule stated by this court in Shaw *v.* Railroad Co., 101 U. S., 56, referred to in the opinion of the learned judge in the court below, and sanctioned also by Daniels in his treatise on negotiable notes, 1 vol., sec. 724, to the effect that a promissory note past due still remains negotiable.

Courts and law writers have differed as to the proper interpretation in more respects than one of the clause, "promissory notes negotiable by the law merchant," as used in the act of March 3, 1875; and the weight of judicial opinions uttered on this subject lean very strongly in the direction of the interpretation that the clause was not intended to embrace all such instruments as would be negotiable according to the general principles of the law merchant, which was understood to be a part of the common law long prior to the passage of the statute of Anne (3 and 4 Anne, c. 9,) but only such as are negotiable according to the local law.

Daniel on Negotiable Instruments, vol. 1, sec. 10.

This latter view was recognized as the correct one by Judge Gresham in Gregg *v.* Weston, 7 Bissell, 360, wherein, in addition to this, the statement of the court leads strongly to the conclusion that the clause was also

intended to be limited further to such negotiable instruments only as are in the hands of a *bona fide* purchaser for value before maturity, and are subject to no equities in favor of the maker. The court, Gresham, Justice, in that case in giving construction to the clause "promissory notes negotiable by the law merchant," said: "They are notes having the qualities of promissory notes negotiable by the law merchant, namely, notes which, in the hands of a *bona fide* purchaser *for value before maturity were subject to no equities in favor of the maker.*"

Gregg *v.* Weston, 7 Bissell, *supra;*
Miller *v.* Race, 1 Burr, 452.

In view, however, of the decisions of this court, to which we all most respectfully bow, unless and until reversed by the same high authority, this subject will be pursued no further; and but for the fact of the assignment having been made years ago nothing would have been suggested bearing upon the question.

ASSIGNMENTS 1, 2, 3, AND 4.

Inasmuch as the assignments of errors 1, 2, 3, and 4 all relate to the question of the *statute* of limitations and alleged *laches* on the part of complainant, they will be discussed in a measure together.

ASSIGNMENT NO. 2.

And first, as to assignment number 2, it is submitted the court erred in holding that payments of interest on said notes by Thomas Cross, the father of appellants, barred the operation of the statute of limitations as to the deceased mother.

Point I.

It is contended by opposing counsel that the credits on the notes kept the notes alive, and this it is conceded is correct as to Thomas Cross, but, it is submitted, not as to his wife who never signed the notes. She was not a party to the notes in the first place. The suit as to her and her legal representatives is founded exclusively on the mortgages, but had she been joint promissor on the note, the payment by the other joint obligor would not suffice to take the case out of the statute as to her. This principle was recognized in the case of Bell *v.* Morrison, (1 Pet., 351), and has been adhered to without any division ever since. Numerous authorities might be cited in support of this proposition, but it is not deemed necessary.

Mr. Angell on Limitations, section 250, says:

"But it is evident that a payment made by one of several liable *alieno jurie* can not raise an implied promise by them all, and that where the relationship of the parties to a contract is collateral and there is no AGGREGATIO MENTIUM, neither can vary nor effect the liability of the other. Where the maker of a promissory note of more than six years' standing died insolvent, he and a guarantor of the note, it was held, never were jointly liable, and the undertaking of the guarantor being independent of and collateral to that of the maker, the allowance by him as commissioner of the maker's note after his decease as a valid claim against the estate, implied no promise to pay the debt. Both maker and guarantor stand equally independent to each other. If A guarantees to B the performance of any contract he may make with C, and six years elapse after the contract between B and before the bringing of suit against A upon his guaranty, no acknowledgment by C subsequent to the contract can take the case out of the statute as to A. A made an engagement by himself and was in no kind of partnership."

Mr. Angell, proceeding further in the same section, says:

"There can be no question that a party attempted to be charged as the indorser of a negotiable note may be protected by the statute, notwithstanding the maker may have made a direct and positive promise within six years to pay the same, and it has been held expressly that where an acknowledgment was made by an accommodation acceptor within six years of his liability to the payee it was insufficient to deprive the drawer of the protection of the statute. It has been considered an extravagant extension of the general rule to make a mere payment of a sum of money to the indorsee of a note by one of two joint makers sufficient to render the other liable, as the money might have been paid on some other account. The other party must expressly acknowledge the payment on account of the note."

This same doctrine is squarely held in the case of Gardner *v.* Nutting, 4th Greenleaf (Me.), 140. The same principle was also clearly recognized by Deady, Justice, in the case of Eubank *v.* Leveridge, 4th Saw., 279.

The learned judge in his opinion (Record 97) says:

"The rule at common law was that a payment by the principal even after the statute had run revived the debt against the surety as well as himself," and the case of Sigourney *v.* Drury, 14 Pick, 387, is cited in support of the proposition. This clearly has relation only to the case of a personal surety; that is, where there is an indorser, or co-maker, whose signature is attached to the note or contract, and has no reference to the case of a surety who by another and different instrument has pledged his property as security.

Point II.

Section 25 of the Code of Civil Procedure of the State of Oregon provides as follows:

"Whenever any payment of principal or interest is made on an existing contract, whether it be bill of exchange, promissory note, bond, or other evidence of indebtedness, after the same becomes due the limitation shall commence from the time the last payment was made."

Hill's Annotated Code, sec. 25, pages 146-7.

The court below seemed to rely upon this provision of the Oregon statute to sustain the proposition that the payment of interest by the principal debtor, Thomas Cross, kept the note alive as to Pluma F., the security, who never signed the note at all. It is respectfully submitted this provision of the statute does not touch the case. It only serves to decide the effect of a payment of principal or interest on a contract after the same becomes due as to the parties signing such contract or who are parties to it. Only this, nothing more.

If this contention, therefore, is tenable, it is clear both notes were barred by the statute of limitations as to Pluma F. Cross, the surety, long prior to the commencement of this suit. And for this reason the decree of the court below should be reversed.

Statute of Limitations.

Assignments Nos. 1 and 3.

By the law of Oregon as it formerly existed an action to recover the possession of real property was barred unless brought within twenty years from the time the cause of action accrued (Civil Code, sections 3 and 4), and a suit in equity "for the determination of any right or claim to or interest in real property" is barred in the same time (*Id.*, section 378).

This has been changed, and the period is ten years and was at the date of the commencement of the present suit, while an action or a suit upon a sealed instrument must be brought within ten years (*Id.*, section 5).

An action on a promissory note must be brought within six years. (*Id.*)

POINT I.

In Eubanks *v.* Leveridge (4 Sawyer, Circuit Court Reports, 278), the court, Mr. Justice Deady, in discussing the question of the statute of limitations in the case of a note secured by mortgage, said:

"In Anderson *v.* Baxter (4 Oregon, 107) it was held by the Supreme Court of this State that a mortgagee had no interest in the mortgaged premises, but only a lien thereon to secure payment of his debt, and that therefore a suit to foreclose a mortgage was not a suit 'for the determination of any right or claim to or interest in real property' which might be brought within twenty years; that such proceeding was only a suit upon a *sealed instrument*—the mortgage—'for the collection of a debt charged upon specific property, by subjecting the same to sale for that purpose.' This ruling is binding on this court, and was followed by it in the late case of Witherill *v.* Wiberg, *ante*, 232. In Anderson *v.* Baxter it was also held that a suit to foreclose a mortgage was simply in effect a proceeding, not against the person of the mortgagor or his assigns, but, *in rem.*, against the property mortgaged.

"But I apprehend the true doctrine to be that the remedy upon the note and mortgage is like the transaction itself—two-fold. The making and delivery of the note, and the failure to pay the same according to its tenor, gives the holder thereof a right of action against the maker upon which he can obtain a personal judgment for the sum due thereon. So the execution and delivery of the mortgage creates a lien upon the property included in it to secure the payment of the sum mentioned in the note, and in case of a default in such payment a suit may be maintained upon this '*sealed instrument*,' the mortgage, to enforce such lien for the purpose of paying the debt." * * * *

"But the mortgage by which *alone* this burden was imposed is a *contract under seal.* The law which entered

into it and became a part of this contract expressly provided that the lien or security thereby created should not be enforced by suit *unless brought within ten years of the time* the cause of suit accrued."

POINT II.

It has been, therefore, *settled* by repeated decisions of the Supreme Court of the State of Oregon, and these decisions have been followed, *supra*, by the Circuit Court of the United States for the district of Oregon, that under the statutes of that State a suit to foreclose a mortgage given to secure payment of a promissory note is a proceeding *not* on the *note*, but rather a suit on the mortgage; and as the mortgage is a *sealed instrument*, and as the statute of limitations in that State provides that all actions or suits on *sealed instruments* must be brought within *ten* years, that therefore the plea of the statute of limitations to a suit brought to foreclosure, a mortgage more than ten years over due is a good defense.

Anderson *v.* Baxter, 4 Oregon, 107;
Witherel *v.* Wiberg, 4 Sawyer, 232;
Eubanks *v.* Leveredge, 4 Sawyer, 278.

POINT III.

It has further been settled by the rulings of the Supreme Court of the State of Oregon that a suit may be maintained to subject mortgaged premises to the payment of the debt secured by the mortgage, *after* the statute of limitations has run against the note.

Myer *v.* Beal, 5 Oregon, 131.

But of course in such case, in harmony with the other rule just alluded to, the suit to foreclose must be brought before the expiration of ten years limitation applicable to sealed instruments, otherwise a plea of the statute would be a defense.

The same ruling has been made in

Sichel *v.* Carrillo, 42 Cal., 498;
McElwayne *v.* Cohen, 13 Peters, 312;
Townsend *v.* Jamison, 9 How. U. S., 413;
Sturgis *v.* Crowenshield, 4 Wheat., 122;
Waltermire *v.* Westover, 14 N. Y., 207.

In all such cases it will be seen the suit must of necessity be on the mortgage, and not on the note.

And counsel may contend in this case that the notes are not essential to the maintenance of this suit as against Mrs. Cross and her heirs; and to this we agree, and that the suit can be prosecuted in a proper jurisdiction, on the mortgages independent of the notes, and this although suit on the notes has been barred. Indeed, this seems to be the theory upon which the case is prosecuted, for the plaintiff pleads assignment of the mortgages to Mr. Allen in a separate and independent allegation from the allegation of the assignment of the notes, and Mr. Lewis swears the mortgages were assigned by him to Mr. Allen. In other words, he grounds his cause of suit as against the heirs of Pluma F. Cross on the mortgages, and not on the notes. And it is evident that any suit as against her or her heirs must be founded on the mortgages and the mortgages alone, for without them she made no compact which is or ever was the foundation of a suit or action.

Now if the plaintiff seeks to evade the effect of limitation laws, ignoring the notes, which he must do, because of the authority of Bell *v.* Morrison, *supra*, then he has placed himself in the inextricable dilemma of a cause of suit barred on the one horn by limitation, and of a cause of suit prosecuted in a court without jurisdiction on the other.

Point IV.

What are the facts? When were these mortgages *due*, if we may so speak? When, in other words, did the right of Allen and Lewis, the creditors, to institute suit to foreclose attach?

The $30,000 note became due November 1st, 1874. The suit was commenced August 6th, 1884. (Record, 10.) As to the mortgage, therefore, given as security for this note, which was dated November 1st, 1871, securing note due *three* years after date, this suit was in time, provided it be held the suit is on the mortgage. But the $10,000 note was dated January 22, 1872, and was due *one* year after date, hence the right of Allen and Lewis, to institute suit to foreclose the mortgage given to secure *this* note attached January 22 or January 25, 1873, at furthest, allowing three days for grace. This suit, therefore, was not commenced to enforce this mortgage—this *sealed instrument*—until *eleven years six months and twelve* days after such right accrued. In *any* view, therefore, it is confidently insisted, plaintiff's right of suit to foreclose this mortgage was barred by the State statute of limitations, which provides that an action or suit on a *sealed instrument* must be brought within ten years.

Oregon Civil Code, secs. 5 and 378.

Point V.

It is true this court held in Ewell *v.* Daggs, 108 U. S., 143, that if an action on the debt secured by a mortgage on real estate in the State of Texas is not barred by the statute of limitations a suit on the mortgage itself is not barred, but this decision was based solely on rulings of the Supreme Court of the State of Texas based on the construction of certain State statutes, and an examination shows an absence in that State of any statute re-

quiring an action or suit on a mortgage or other sealed instrument to be brought within any given time. Suppose there had in that case been a State statute, as in Oregon, requiring an action or suit to be brought on a *sealed instrument* in *ten* years, and there had been repeated adjudications of the Supreme Court of the State of Texas, as there have been in the State of Oregon, to the effect that a suit to foreclose a mortgage is a suit on a *sealed instrument*, within the meaning of such statute, would this court have held that, notwithstanding such statute and such line of decisions of the Supreme Court of the State giving construction to it, a suit could have been maintained to foreclose a mortgage after such period of ten years had elapsed, and that a plea of the statute against it would have been unavailing?

It is respectfully insisted, therefore, in this view it must be held in the case at bar that this suit, in so far as it relates to the appellants, the legal representatives of Pluma F. Cross, is *on the mortgages* and *not* on the *notes*. The suit is, in so far as it affects the interests of these appellants, one on two "*sealed instruments*," namely, the *two mortgages*, and this is true in view of the statutes and decisions of Oregon, whether the notes are, or are not barred by the statute of limitations.

Assignment No. 4.

Laches.

POINT I.

But finally, it is confidently submitted, the surety was discharged by negligence in this case, amounting to gross *laches* of the creditors in not enforcing their claim against the principal debtor. A creditor must, if he wishes to hold the security, pursue with legal diligence all his means and remedies direct, immediate, and collateral to

recover the amount of his debt from the maker of the note, and in this case the creditors should have taken every compulsory process of law against the maker of the notes until his individual mortgaged property was exhausted, before they can look to the surety.

Bank of U. S. *v.* Weiseiger, 2 Peters Rep., 347.

In this case there has been not only a lack of legal diligence but a most culpable delay and inexcusable negligence. Attention of the court is here attracted to the facts and to certain dates illustrating them.

The first of these notes, that for $30,000, which came due last, matured November 1, 1874; the second note, for $10,000, became due January 23, 1873. Pluma F. Cross, the surety, was then dead; she died September 16, 1872, two years and more before maturity of the note coming due last, and over four months before the maturity of the note coming due first. All question, therefore, of any consent of the surety to extension of time, or change in terms of obligation, must be out of the question. Moreover in such a case the principal surety being dead, and only represented by minor heirs, courts will require greater diligence in the performance of a trust than in an ordinary case. But mark the delay in utilizing the mortgaged property of the principal debtor in reduction of the debt, to say nothing of the change in obligation and the extention of time.

Fourteen months and twenty-three days elapsed after the maturity of the note becoming due *last*, and *three years* exactly after the maturity of the note becoming due *first*, before any steps whatever were taken looking to the collection of the debts; and *then*, January 22, 1876, instead of proceeding to foreclose the mortgages, a deed absolute on its face (this *three years four months and seven days* subsequent to the death of Pluma F.) is made by Thos. Cross

as principal debtor to Mr. Lewis, one of the members of the creditor firm, as hereinbefore stated, conveying all the property mortgaged, including his interest in his wife's property as tenant by courtesy. But not only so—*nine* months more nearly, from January 22, 1876, to October 14, 1876, are suffered to elapse before any steps whatever are taken by Mr. Lewis as trustee, as appears from the pleadings and evidence in this case, to sell said premises or any part thereof; and, finally, on October 14, 1876, certain portions of said premises are sold at public auction, when, after selling various parcels at private sale, between October 14, 1876, and November 15, 1876, another delay occurs, without *one word* of explanation (commencing with the date of the last private sale, November 15, 1876), of nearly *eight years*—to be exact, *seven years eight months and twenty-one days*—before any further steps are taken, either by Mr. Lewis as trustee or by Allen & Lewis or by Mr. Allen, when, on August 6, 1884, the bill of complaint in this case is filed. That is to say, a period of *eleven years six months and fifteen days* elapse between the date of the maturity of the $10,000 note, and a period of over *nine years and nine months* between the date of the maturity of the $30,000 note and the date of the commencement of this suit (complaint, Record 6—10), while a period of just *twelve years*, lacking forty days, elapsed between the date of the death of the surety, Pluma F. Cross—September 16, 1872—and the date of the commencement of this suit, August 6, 1884, and a period of *six* months elapsed between the date of the death of the principal debtor, Thos. Cross, who died February 5, 1884 (complaint, Record 6), and the date of the commencement of this suit.

The rule as to *laches* is correctly stated in Manning *v.* Hayden, 5 Sawyer, 379, and is, in substance, that courts of equity, while not bound by any statute of limitation, yet in something of an analagous theory the court

will look to the statute for a guide. In extreme cases where the parties have been circumvented, overreached, or hoodwinked, the guilty party need not attempt to shield himself under a statute. But here is the case of trustees of a trust property which the law guards jealously and strictly. It was not the province, nor was it in the power of the surety here to hinder proceedings under the contract by which her property was hypothecated—death had interposed and made all this impossible. It was clearly the duty of the creditors for the protection of their *cestui que trust*—especially was this so in view of the fact that Pluma F. Cross had died leaving minor children as her representatives—to have foreclosed and sold the entire trust property; but instead, they delay suit until the lapse of nearly twelve years after the junior, and nearly ten years after the senior mortgage was due, and twelve years after the death of Mrs. Cross. These notes were drawing interest at immense rates, the $30,000 note bore *ten* and the $10,000 note, *twelve* per cent. per annum; hence, the debt was accumulating all these years at a fearful pace—$4,200 each year, the interest alone in the twelve years delay amounting to over $50,000. The case exhibits most inexcusable negligence in the execution of a most important trust. This alone should operate a release of the lands of the heirs of the deceased surety.

It is respectfully submitted the decree of the court below should be reversed.

JOHN H. MITCHELL,
Solicitor for Appellants.

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In the Supreme Court

OF THE
UNITED STATES
OCTOBER TERM, 1891.

E. C. Cross
and Frank R. Cross,
Appellants.

vs. No. 23

L. H. Allen,
Respondent (Complainant.)

Appeal from the Circuit Court of the United States for the District of Oregon, 1887

* * *

Brief for the Heirs

Of L. H. Allen, substituted for
L. H. Allen, Respondent.

*

Geo. H. Williams,
C. E. S. Wood,
Attorneys for Respondents.

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 28 OAK STREET.
1891.

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a firm of Portland, Oregon, of which firm L. H. Allen, the complainant, was senior partner, and C. H. Lewis resident and managing partner.

This note was for $30,000, with ten per cent. interest, payable in three years. To secure this note Thomas Cross and Pluma Cross, his wife, executed on the same date a mortgage to certain lands mentioned in the bill. Of these lands Pluma Cross was the owner in her own right of the parcels numbered tracts 14 and 15, and it is admitted that as to these lands she signed the mortgage as surety for her husband. (Pp. 25-77 Printed Record).

Tracts 14 and 15 contained together 80 acres, and, as is alleged in the answer, did not exceed $10,000 in value. (P. 30). On January 23, 1872, the same parties executed and delivered to Allen & Lewis another note and another mortgage of the same property and certain additional property (lots in Salem, Oregon) to secure this second note for $10,000, payable in one year from date with interest at twelve per cent. per annum. This mortgage was also signed by Pluma Cross as surety for her husband, Thomas Cross, so far as these same parcels 14 and 15 are concerned.

Thus, except as to differences in date, the questions arising under the two mortgages are identical, and in effect depend upon lands of the value of $10,000 or less, given as surety upon an indebted-

ness of $40,000, $30,000 with interest at 10 per cent. per annum from Nov. 1, 1871, and $10,000 with interest at 12 per cent. per annum from Jan. 23, 1872.

Upon this proposition the defenses are as follows, all other issues being expressly waived: (P. 77, Stipulation.)

I.

THE COURT HAS NO JURISDICTION.

II.

THE CLAIM IS STALE AND THE COMPLAINANT HAS BEEN GUILTY OF LACHES.

III.

THE CLAIM IS BARRED BY THE STATUTE OF LIMITATIONS.

IV.

THE SURETYSHIP LANDS OF THE MORTGAGE ARE DISCHARGED FROM THE DEBT BECAUSE THE COMPLAINANT VARIED THE ORIGINAL CONTRACT WITHOUT CONSENT OF THE SURETY,

a. By selling the mortgaged lands of the principal debtor (her husband) at private sale and not by foreclosure and under process of law, as contemplated by the mortgage.

b. By extensions of time granted to the principal debtor.

The facts pertinent to each of these propositions will be stated in connection with the respective arguments.

The more important parts of the record are to be found at the following pages of the printed record:

The Bill,	2.
Amendments to the Bill,	49.
The Answer,	24.
Opinion on Exceptions to Answer	39.
Stipulation that all allegations of the amendments to the bill are true except as denied by the answer and except as to the value of the lands sold at auction	53.
Stipulation as to the facts in the case	75.
Opinion on final hearing	81.
Opinion on re-hearing	94.

I.

THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON HAD JURISDICTION OF THIS SUIT.

a. The transfer of the notes and mortgages from Allen & Lewis to L. H. Allen was in good faith and not collusive.

This is admitted in the sworn answer (page 26). "Defendants admit that * * the said Allen and Lewis, for valuable consideration to them paid by said complainant, duly endorsed and delivered to the said complainant, so endorsed, the promissory note hereinbefore mentioned, and did thereafter and heretofore, for such valuable

consideration, make, execute and deliver said complainant an assignment of said mortgage, hereinbefore mentioned." And so also for the second note and mortgage.

Mr. C. H. Lewis says distinctly that he had no pecuniary interest in the suit (page 107).

And that it was made in good faith and without collusion (pages 109, 110).

There is absolutely *nothing* to contradict this, and it must be taken as true till the contrary be shown.

Briggs vs. French, 2 Sumner, 254.
Murray vs. Lardner, 2 Wall. 110, 121.
Cromwell vs. County of Sac., 94 U. S. 351.
Foote vs. Hancock, 15 Blatch. 344.

b. If the transfer be absolute and in good faith, the fact that the advantage of suing in the Federal courts may have been considered is immaterial. The court cannot and will not in such a case go into the motives that induced the transfer.

M'Donald vs. Smalley, et al., 1 Peters, 623, 624.
Barney vs. Baltimore, 6 Wall. 288.
Smith vs. Kernochen, 7 How. 216.
Blackburn vs. S. M. & M. R. R. Co., 2 Flippen, 538.
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c. The note was "negotiable by the law merchant," although over due.

Town of Thompson vs. Perrine, 106 U. S. 589.

Shaw vs. Railroad Co., 101 U. S. 563.

Nat. Bank of Washington vs. Texas, 20 Wall. 88. (Separate opinion of Swayne, J.)

Renwick vs. Williams, 2 Md. 364.

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Powers vs. Neeson, 19 Mo. 190.

Britton vs. Bishop, 11 Vt. 72.

1 Daniel on Neg. Inst., sec. 724, p. 658, 3 ed.

Codes of Oregon, p. 1415, sec. 3188. (*Stat. Anne.*)

This rule of law was first established in Mitford vs. Wallicot, 1 Salk. 129.

d. There is no doubt that a mortgage given for the security of a note passes by the transfer of the

note. The mortgage is an incident of the debt, and passes with it. It is the debt that gives character to the mortgage, not the mortgage which determines the character of the debt.

Daniel on Neg. Inst., 3 ed., sec. 834, p. 788.
Stevens vs. Chadwick, 10 Kansas, 333. (Brewer, J.)

The rule is so well settled that we will not cite other authorities.

The language of the law of March 3, 1875, is (18 Stat. at Large, 470), "Nor shall any circuit or district court have cognizance of any suit founded on any contract in favor of an assignee *unless* a suit might have been prosecuted in such court to recover thereon if no assignment had been made, *except in case of promissory notes negotiable by the law merchant.*"

It follows from the foregoing (c, d,) that the bona fide holder of the note and mortgage, though they were transferred after maturity, can, where diverse citizenship exists, sue in the Federal courts under the law of 1875.

Tredway vs. Sanger, 107 U. S. 323.
Seckel vs. Backhaus, 7 Bissell, 354.
Smith vs. Kernochen, 7 How. 198.
Barney vs. Baltimore, 6 Wall. 280.
McDonald vs. Smalley, 1 Peters, 621.

DeLaveaga vs. Williams, 5 Saw. 574.
Marion vs. Ellis, 10 Fed. Rep. 410.

II.

THE CLAIM IS NOT STALE, NOR HAS THE COMPLAINANT BEEN GUILTY OF LACHES.

In the lower court the argument upon *laches*, *staleness* and *limitations* was made as one, and was, in effect, that equity will follow the law as to the statute of limitations, and that twelve years had elapsed since the junior mortgage fell due and before suit was brought; also twelve years since the death of Mrs. Cross, and *not quite* ten years since the senior mortgage fell due.

We will discuss the matter more fully under the next succeeding head. It seems enough to say here:

1st. That both mortgages were valid and subsisting liens duly recorded.

2d. That during the period mentioned the creditor was engaged in collecting his debt from the principal, and in a way most advantageous to the surety (p. 76).

3d. That no administrator has ever been appointed for the estate of Pluma Cross (p. 76, *Sixth* ½).

4th. That this is a case of concurrent jurisdiction, and the statute of the State allows as time in which to bring an action:

In cases of specialty contracts or actions concerning title to real estate, *ten years*.

In cases of simple contracts, *six years*.

So we would have certainly not *less* than the statutory period in which to sue, whether this court acted in analogy to the statute of limitations or was absolutely bound by it.

III.

THE SUIT IS NOT BARRED BY THE STATUTE OF LIMITATIONS.

The Oregon statute is, as aforesaid, *ten* years for special contracts or suits for *realty*, *six* years on simple contracts.

The first note (secured by the senior mortgage) was made on Nov. 1, 1871. It ran for three years from date. The statute of Oregon adds three days of grace (§ 3192, p. 1415; Mullen vs. Abbott, 1 Oregon, 258). That the notes were entitled to grace is admitted (See the answer, p. 25). Therefore, the note was due Nov. 4, 1874.

Payments of interests were made Jan. 1, 1887, and again in 1878 and 1880, and last on Dec. 22, 1881. (Answer, p. 26). The Oregon Code of Civil

Procedure provides, § 24 p. 146: "Whenever any payment of principal or interest has been or shall be made upon an existing contract, whether it be bill of exchange, promissory note, bond or other evidence of indebtedness, if such payment be made after the same shall have become due, the limitation shall commence *from the time the last payment was made.*"

This language formed a part of both these contracts and needs no interpretation; but see

Sutherlin vs. Roberts, 4 Oregon, 378.
Partlow vs. Singer, 2 Oregon, 370.
Torrence vs. Strong, 4 Oregon, 39.

§ 24, p. 144, Oregon Code of Civil Procedure, provides:

"No acknowledgement or promise shall be sufficient evidence of a *new* or *continuing* contract, whereby to take the case out of the operation of this title, unless the same is contained in some writing signed by the party to be charged thereby, *but this section shall not alter the effect of any payment of principal or interest.*"

Independently of § 25, this section (24) has been held to be declaratory of the common law, viz.: That any payment on a debt, *whenever* made, revives or continues the debt.

Creighton vs. Vincent, 10 Or. 57.

Therefore this first note would not have been barred till six years from the date of the last payment (Dec. 22, 1881), or *Dec. 22, 1887*; but suit was begun *Aug. 6, 1884.* (p. 10.)

The second note ($10,000.00) was payable one year from date (Jan. 23, 1872), and, allowing days of grace, fell due Jan. 26, 1873, and would have been barred Jan. 26, 1879. But the answer admits that interest was paid thereon up to Jan. 25, 1879, and afterwards, on Feb. 1, 1883, a further sum of $1,686.35 was paid on account of interest (p. 27). Therefore the full interest was paid one day before the note was barred, and also a payment was made Feb. 1, 1883, which would have revived the debt even if no prior payment had been made; and the note would not have been barred till Feb. 1, 1889. As we have seen, the suit was begun Aug. 6, 1884.

Creighton vs. Vincent, 10 Or. 57.

A cause of suit not barred against the principal debtor is not barred against the surety.

Ewell vs. Daggs, 108 U. S. 146.

IV.

THERE HAS BEEN NO EXTENSION OF TIME TO THE PRINCIPAL DEBTOR, NO ALTERATION OF THE ORIGINAL CONTRACT, AND THERE EXISTS NO REASON FOR THE DISCHARGE OF THE LANDS GIVEN IN SURETYSHIP. THE CONTRACT OF THE SURETY IS TO PAY THE DEBT OR TO PAY PRO TANTO IF THE PRINCIPAL DEBTOR DOES NOT. AND IN LAW AND EQUITY THE SURETY SHOULD BE HELD TO THIS CONTRACT UNLESS THE CREDITOR WITHOUT HIS CONSENT HAS DONE SOMETHING WHICH ADDS TO THE BURDEN OF SURETYSHIP VOLUNTARILY ASSUMED. THEN THE SURETY IS DISCHARGED TO THE AMOUNT OF THE INJURY ONLY, IF THAT BE ASCERTAINABLE AND SEPARABLE.

a. There was no extension of time.

The burden of proof is on the defendants to prove an extension. *There is not a particle of evidence on this point.*

The allegations in the answer being new matter, and upon information and belief, are not evidence.

1 Dan. Chan. Prac., p. 843, 845, and note 1, 846 (4th edition).

Story's Eq. Pl., § 849 a, 2 Story's Eq. Jur. § 1528, 1529.

Hart vs. Ten Eyck, 2 Johns. Ch. 87.

The court below, and the defendants in their brief filed in that court, unite in giving Mr. Lewis the highest character for rigid integrity and honor. If appellants seriously believed that Mr. Lewis

had extended the time of payment definitely and absolutely, they would have examined him. They had him on the witness stand, and their failure to ask any such questions must be considered as an acknowledgement that they did not believe the time had been extended.

Not only does no extension of time appear, but it does definitely appear that *no consideration* whatever was exchanged for the trust deed, and no exact limit of time was set. In fact, considered even as an extension of time, it could have been disregarded by Mr. Lewis at any moment, and he could have elected to proceed on the notes and mortgages. It was received after both notes were in default, *without new consideration*, and by adding to the remedy of foreclosure the remedy of legal ownership and possession of the property was intended to and did expedite the collection of the debt. It was a *hastening* of the remedy, not a delay. It was *optional* with the creditor whether to use it at all, and when to cease to use it.

Mere delay never discharges a surety.

Creath's Adm. *vs.* Sims, 5 How. 206-207.
McLemore *vs.* Powell, 12 Wheaton, 556.
King *vs.* Baldwin, 2 Johns. Ch. 558.
Bank of Utica *vs.* Ives, 17 Wend. 503.

"It has been repeatedly held that the mere fact that the creditor takes from the principal a mort-

gage or trust deed of property as collateral security for the debt for which the surety is liable, which matures after the maturity of such debt, does not of itself, in the absence of an agreement to that effect, extend the time or discharge the surety."

Brandt on Suretyship, etc., § 320, p. 432, citing cases.

See also Brandt on Suretyship, §§ 318, 319.

See also

Hagood *vs.* Blythe, 37 Fed. Rep. 249.

Hays *vs.* Knox, 41 Mich. 529.

Mich. State Ins. Co. *vs.* Soule, 51 Mich. 312.

b. There has been no alteration of the contract.

The contract of Pluma Cross was to pay the debt to the amount of her lands, if her husband did not. To this contract she should be held. It would be grossly inequitable for a court of conscience to discharge these lands upon a mere pretext, and aid in the violation of an agreement binding in law and morals.

If there has been any alteration in the contract, what is it?

The mortgage of Pluma Cross' lands was precisely as if a separate indenture of mortgage had been drawn between her and the creditor. The fact that it is contained in the same sheets of paper as her husband's mortgage has no point in

law, and we take it will not be considered as of any consequence by a court whose maxim is to look at the intention and the substance, not the form.

Suppose it had been thus executed as a separate indenture of mortgage. How would that have been affected by Cross giving a trust deed to Lewis to sell out his lands advantageously at private sale, rather than sacrifice them at a foreclosure? Is it not merely a voluntary giving to Lewis a simple and expeditious means of collecting his debt, in addition to the involuntary one provided by law? Then, it affects nothing, but adds to the remedy. The burden is on the defendants to point out wherein Mr. Lewis' hands were tied by his acceptance of the trust deed. Let them show what prevented his canceling the whole arrangement at any moment. *Let them show what prevented Pluma Cross, or her representatives, from paying the debt at any instant of time, and availing themselves of the principle of subrogation.*

There is a class of cases, of which Miller vs. Stewart, 9 Wheaton 234, is an example, in which the law of sureties is thus stated: "The liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no

further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal."

We submit, as legal truths to be borne in mind when considering this class of authorities:

1st. They arise exclusively in questions of suretyship on *bonds* and such instruments.

Where there is an indeterminate moral, as well as a financial risk, the contract necessarily involves vague and subtle questions, and the fact *injuria vel non* is not ascertainable; and therefore the method of absolute mercy to the surety is to adhere to the exact terms and letter of the contract.

2d. There must be a clear and substantial variation of the contract—a substitution of a new contract for the old; and upon this question we consider the dissenting opinion in Miller vs. Stewart more instructive than the opinion of the court. We think a reasonable test as to whether there has been an actual variation or substitution is, "*Can the surety pay the debt and be subrogated to the rights of the creditor?*" So long as he can, there is no variation, no reason to discharge him from his obligation, for his protection is always in his own hands.

Benedict vs. Thoe, 35 N. W. (Minn.) 10.

b. *If there be a variation it must be* SUBSTANTIAL *and to the* INJURY *of the surety; and if the injury be separable and determinate, and does not involve the whole amount, the surety is only discharged* PRO TANTO.

Again referring to the decision chiefly relied on by the appellants, (Miller vs. Stewart, 9 Wheaton, 234) we deny the absolute truth of the second clause of our quotation, viz: "It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit." The reason of the law is the life of the law; and when the law absolves a surety because of a variation in a contract which is to his *obvious* benefit, it ceases to be reasonable and must die. Neither Justice Story nor the Supreme Court of the United States can make this doctrine live, for it is opposed to common sense, and in the growth of law only that survives which is agreeable to that consensus of opinion called "common sense." An English court of law probably thought the time would never come when a debtor would be absolved from paying a debt a second time, even though his sealed obligation were proffered against him by the creditor; yet to-day to require him to pay twice because he had neglected to obtain a surrender of his bond would be considered monstrous even by the courts of law. It was considered monstrous by the common sense of the people long before the courts viewed it in that light. It

would be pedantic to cite to this court illustrations from the history of both English and Roman law, of rigid and narrow and technical rules that survived in the conservative institutions of the law long after they were opposed to the popular thought, and were then, perhaps, done away with tenderly by the method of a legal fiction.

So we say to this court that though it may not be to-day, yet the time is inevitable when the doctrine that a variation of a contract to the clear and palpable advantage of a surety discharges the surety, will pass into the oblivion it deserves, with those other unreasonable technicalities by which justice lived in form, but was dead in spirit.

The true rule, as it commends itself alike to homespun or to ermine, is: Give the surety the benefit of every doubt; but if he be not damaged by a variation of the contract, *hold him to his own contract.* What is it? It is in substance to *assure* the creditor, to hold him *harmless* on the debt, to *secure* him, *to pay if the principal does not;* and it is offensive to true justice that the surety be discharged from this contract for any but reasons of matter and substance. This is the doctrine of to-day, and is supported by the following authorities:

Brandt on Suretyship, § 375 and cases cited.
U. S. vs. Hodge, 6 How. 279.
P. M. Genl vs. Munger, 2 Paine C. C. 189.
American Bank vs. Baker, et al. 4 Metc. 177.

Baker vs. Brooks, 8 Pick. 128.
Wharton vs. Duncan, 83 Pa. St. 44.
Neff's Appeal, 9 Watts & Serg. 36.
Hayes vs. Ward, 4 Johns. Ch. 130.
Bonney vs. Bonney, 29 Iowa, 451.
Thomas vs. Cleveland, 33 Mo. 127.
Cummings vs. Little, 45 Me. 183.
Dixon vs. Ewing, 3 Ohio, 280.

Where the statute does not permit suit to be brought till *a year* after appointment of administrator, and the creditor agrees with the administrator of the principal debtor that he may sue at the end of four months but not earlier; Held, not to the injury of the surety, and he is not discharged.

Gardner vs. Van Nostrand, 13 Wis. 543.

See also

Powers vs. Silberstein, 15 N. E. (N. Y.) 185.
Black vs. DeCamp, 43 N. W. (Ia.) 625.

Surety is only discharged pro tanto.

Marshall vs. Dixon, 9 S. E. Rep. (Ga.) 167.
Bryan vs. Henderson, 12 S. W. (Tenn.) 338.

See also Brandt on Suretyship, § 321 and note 2.

Where only the remedy is accelerated, and no express and binding extension is given, the surety is not discharged.

Colebrooke on Collat. Securities, §§ 156, 157.

V.

THE SURETY HAS NOT BEEN INJURED BY THE SALE OF THE LANDS BY LEWIS UNDER THE TRUST DEED.

Again asserting that the trust deed did *not vary* the original contract and was voidable at any time by Lewis, we call attention to this important fact : *That, allowing the appellants their own estimate of the value of the lands owned by Thomas Cross and sold by Lewis at private sale, allowing their own valuation of Pluma Cross' lands, allowing all that is claimed in the answer,* the surety lands fall more than three thousand dollars short of paying the balance due on the *first* note *alone.*

The amount due on the *first* note when suit was brought was, as fixed by the stipulation (p. 75) - -	$45,137 04
Interest on same, from December 22d, 1881, to date of confirmation of sale, November 10th, 1885 - - -	17,531 05
(See Stipulation, p. 75; Consent to Confirmation, p. 69).	
Total due on first note - -	$62,668 09
Deduct amount realized on sales of land, as per receiver's report (p. 64) -	44,759 04
Balance on first note - -	$17,909 05

Brought forward, - - -	$17,909 05
Interest on this from November 10th, 1885, to date of final decree, October 18th, 1886 - - - - - - (p. 103.)	1,640 45
Total due on first note to last date -	$19,549 50
Value of the property sold by Lewis, as claimed by the appellants (pp. 29, 30, and see Stipulation (p. 76), is -	50,525 85
Amount actually realized by sale -	44,759 04
Credit appellants with difference -	$ 5,766 81
Add value of Pluma Cross' lands, as per answer - - - - -	10,000 00
Total credits to appellants, as claimed by them - - -	$15,766 81
Total balance on *first* note - -	$19,549 50
Total credits due appellants - -	15,766 81
Balance due at date of decree on *first* note after applying all credits due surety - - - - - -	$ 3,782 69

This is on the *first* note *only.* Add the *principal* of the second note *without interest* ($10,000), and the lender, after allowing *every* credit claimed by the surety, is a loser more than thirteen thousand

dollars. Simple interest alone would more than double the principal. Thus it seems to us a curious commentary upon equity that a court of equity is asked to increase this loss for any reasons that have been suggested.

CONCLUSION.

We call the attention of the Court to these facts as a summary:

No consideration passed for the trust deed.

There was no agreement to delay or extend the time of payment.

The trust deed was in effect a mortgage, not a deed absolute. So there was no change in the contract, and also no merger could result. (Watson *vs.* Dundee M. & T. I. Co., 12 Or. 484. Pomeroy's Eq. Jur.)

The remedy was *accelerated*—the surety was *benefited*—by a careful private sale, instead of a forced sheriff's sale.

No administrator was ever appointed for the estate of Pluma Cross, and the statute of limitations did not run. Angell on Lim., §55; Wilson vs. Rose, 3 Cranch C. C. 37.

Payments of interest kept the debt alive. They were made both before and after the maturity of the notes.

The mortgage could be foreclosed within ten years, even if the notes were barred.

Sparks & Kelsey vs. Pico, 1 McAllister, 497.
Hayes vs. Frey *et al*, 11 N. W. Rep. 701.
Potter vs. Stransky, 4 N. W. Rep. 95.
Goodwin vs. Morris, 9 Or. 322.

These appellants were minors, and there was no one whom Lewis could consult. Thos. Cross was the appellant's father and guardian, by nurture at common law, and under the Oregon Code.

These appellants were bound by his acts.

He, himself, arranged the trust deed and the sales thereunder.

Allowing full credits to the surety there is a deficit of about thirty thousand dollars on the debt, and the appellants by *their own showing are not injured.*

The case was four times argued in the court below:

1st. On exceptions to the answer.

2d. On demurrer to the answer.

3d. On the bill and answer.

4th. On re-hearing on the bill and answer.